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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL OKLAHOMA BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

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In the
Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL OKLAHOMA BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Oklahoma that the name of the Appellant be stricken from the roll of attorneys of the state and that he be disbarred. The judgment was entered on June 18, 1963, petition for rehearing denied September 10, 1963, second petition for rehearing denied October 25, 1963. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial and important questions are presented.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court is reported in *State* v. *O'Bryan* (Okla.), 385 P.2d 876. There is no longer a state reporter system in Oklahoma. This opinion is attached as Appendix A. The Report, Findings and Recommendation of the Executive Council and the Central Committee of the Oklahoma Bar Association is attached as Appendix B. The Findings of Fact, Conclusions of Law and Recommendation of the Trial Examiner is attached as Appendix C.

JURISDICTION

These proceedings were brought under "Revised Rules Creating, Controlling and Regulating the Oklahoma Bar Association. Adopted October 6, 1958, by the Supreme Court of the State of Oklahoma." The judgment of the Supreme Court of Oklahoma disbarring Appellant and striking his name from the roll of attorneys was entered on June 18, 1963. The first petition for rehearing was denied September 10, 1963, and the second petition for rehearing was denied October 25, 1963. Notice of appeal was filed in that court on December 9, 1963.

This appeal is taken pursuant to 28 U.S.C.A. § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review this case on appeal: *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826; *Marcus* v. *Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, holding that rules of a state supreme court are within the concept of a state statute for the purposes 28 U.S.C.A. § 1257(2).

QUESTIONS PRESENTED

Whether the Revised Rules of the Supreme Court of Oklahoma "creating, controlling, and regulating the Oklahoma Bar Association, adopted October 6, 1958," as applied to Respondent in a proceeding to disbar him upon a charge of having filed a false and fraudulent claim in a bankruptcy proceeding were invalid by reason of repugnancy to the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the United States Constitution?

Embraced within this broad question are the following subsidiary questions:

1. The said Rules provide for the procedure to be used in bringing a disciplinary matter before the Supreme Court of Oklahoma. At several points in this procedure alternative methods are permitted to the Complainant Bar Association. In proceeding against the Respondent, the Complainant systematically chose that alternative which offered Respondent the least opportunity to defend himself, even though the charge was a serious one and the probable punishment if the findings were to be against him the most extreme, disbarment. Under these circumstances were the said Rules as applied to Respondent invalid as repugnant to the said clauses of the United States Constitution?

2. As applied to Respondent, the Rules permitted one member of the Executive Council or Central Committee of the Oklahoma Bar Association to be appointed as the Trial Examiner to hear the evidence, make findings of facts, conclusions of law, and make recommendations as to the disposition of the charges. The member who was appointed Trial Examiner had participated in the proceedings of the Executive Council or Central Committee which resulted in the

charges being brought. This, as demonstrated by the record resulted in the charges being heard by a Trial Examiner who, even before the hearing, was predisposed to findings, conclusions and recommendations against the Respondent. Under these circumstances were the said Rules as applied to Respondent invalid as repugnant to the said clauses of the United States Constitution?

3. The "complaining witness" in the proceeding was, in fact, the Chief Judge of the United States Distract Court for the Western District of Oklahoma, the Honorable Stephen S. Chandler. The alleged "false and fraudulent claim" was filed in the court of the said judge. The said judge denied the claim and summarily disbarred the Respondent from practice in the said Federal Court. The record of the hearing on this claim and Respondent's disbarment was permitted, over objection, to be introduced into evidence by the Trial Examiner. This record contained remarks by the said Judge highly prejudicial to the Respondent. The Judge was not called as a witness by the Complainant. The Respondent was thereby denied the right to cross-examine the Judge as to his remarks in the record in the hearing in the Judge's Court. Furthermore, the Respondent was not informed nor did he have access to the knowledge that the said Judge was indeed the "complaining witness" until after the hearing before the Trial Examiner was complete and the findings, conclusions and recommendations of the Trial Examiner had been approved by the Executive Council and referred to the Supreme Court of Oklahoma. Respondent was thus denied not only the knowledge of the identity of, but also the right of confrontation of, an indeed formidable accuser. On the other hand the identity of the accuser was known to the Trial Examiner. Under the above recited circum-

stances were the said rules as applied to Respondent permitting these conditions to occur invalid as repugnant to the said clauses of the Constitution of the United States?

4. The predisposition of the Trial Examiner toward the disbarment of Respondent, as can be demonstrated by the record, resulted in a warped record being produced at the hearing. It was upon this warped record that Respondent had to object to the findings of facts, conclusions of law and recommendations in the Supreme Court of Oklahoma and indeed in his appeal to the Supreme Court of the United States. Under these circumstances were the said Rules as applied to Respondent repugnant to the said clauses of the United States Constitution and hence invalid?

5. The Respondent was disbarred upon a charge of having filed a false and fraudulent claim for legal services rendered to a bankrupt. This in spite of the fact that the Complainant through counsel, and even the Trial Examiner, stipulated that Respondent was in fact entitled to have received that which he had asked for in the alleged "false and fraudulent claim." Under these circumstances were the said Rules as applied to Respondent invalid as repugnant to the said clauses of the United States Constitution?

6. The Respondent was denied the right to present evidence at the hearing which would have tended to prove that he did not intend to mislead or deceive the court or its officers in filing his claim in bankruptcy. In light of the circumstances recited in Question 5, above, and in light of the obvious proposition that intent is the essence of a charge of filing a false and fraudulent claim were the said Rules as applied to Respondent invalid as repugnant to the said clauses of the United States Constitution?

7. The complaint, as it stood up to the conclusion of the hearing before the Trial Examiner, alleged that the Respondent had "filed a false and fraudulent claim." At the close of the hearing, Complainant moved that the complaint "be amended in form of proof offered." The motion was granted. [The charges were not, however, restated formally at any time.] Apparently this was done because the Complainant through counsel and even the Trial Examiner stipulated that Respondent had had a contract to perform the services rendered, that the amount of the claim was reasonable and Respondent had earned what he claimed and had performed valuable services conferring substantial benefits upon the bankrupt. Further, the Trial Examiner had excluded evidence offered by Respondent to show that he had not intended to deceive or mislead the court or its officers. There was thus removed from the hearing the consideration of several essential elements of the charge of having filed a false and fraudulent claim. Prior to the Trial Examiner making his findings, conclusions and recommendation, the Trial Examiner without prior notice to Respondent permitted the motion to conform to be withdrawn and ordered the cause to stand on the original complaint. In light of the above circumstances, are the said Rules as applied to Respondent invalid as repugnant to the said clauses of the United States Constitution?

STATUTES INVOLVED

The Revised Rules Creating, Controlling and Regulating the Oklahoma Bar Association adopted by the Supreme Court of the State of Oklahoma, October 6, 1958:

Article I, Article IV, Sec. 1, Sec. 2, Sec. 3, Sec. 4, Article VII, pt. 1, are set forth in Appendix D, attached hereto. These Rules are published as Chapter 1, Appendix 1, to Title 5 of the Oklahoma Statutes, 1961. They are published under the same designation in the 1963 Cumulative Annual Pocket Parts of West's Oklahoma Statutes Annotated. At a previous time, however, they were carried in the Oklahoma Statutes Annotated as an appendix to Title 5, Section 17. For that reason the rules are so identified in some of the papers in the certified record.

THE RECORD

The certified record consists of one volume of papers filed in the cause and two volumes of transcript of the evidence introduced at the hearing before the Trial Examiner. Reference is made to the volume of papers by the symbol "R" and to the transcript of the evidence by the symbol "Tr.", followed by the volume designation. In addition there is appended to the record following the certificate certain papers filed in the Executive Council of the Oklahoma Bar Association and the Supreme Court of Oklahoma, prior to the cause having been formally referred to the Supreme Court of Oklahoma as State, ex rel Oklahoma Bar Association v. William Howard (Pat) O'Bryan, S.C.B.D. 1792. These latter documents are referred by the symbol "R" with page numbers 218 through 237.

STATEMENT

This disbarment proceeding, is the outgrowth of a claim filed in a bankruptcy proceeding in the United States District Court for the Western District of Oklahoma by the Appellant. This claim was heard by the Chief Judge of the District, the Honorable Stephen S. Chandler. (That these matters are truly relevant to this appeal can be demonstrated by showing that a transcript of the hearing on this claim, together with exhibits and depositions taken in connection therewith, constituted a major portion of the evidence submitted against Appellant at the disbarment hearing. In all, these items make up [Tr. Vol. 1, pp. 23-428].)

The Claim arose out of Appellant's successful handling of a tremendously complicated tax matter for the bankrupt prior to its bankruptcy.

It was, at least originally, the contention of the Trustee in Bankruptcy that Appellant had no contract, oral or written, supporting his claim (Tr. Vol. 1, p. 311).

The Trustee introduced evidence which the court found to show that a letter, which reduced an earlier oral agreement to writing, was "fabricated by Appellant after the bankrupt was declared so to be.

The Trustee also introduced evidence for the purpose of showing that Appellant had referred to the contract in question as an "oral" contract at a time after Appellant asserts that the letter was written.

On this basis, the court, the Honorable Stephen S. Chandler, disallowed the claim of Appellant as being fraudulent and summarily disbarred the Appellant from practice in that court. He further stated that he would notify the Oklahoma Bar Association of the facts (Tr. Vol. 1, pp. 424-427).

On or about November 13, 1958, the Executive Council (or Central Committee) of the Oklahoma Bar Association, purporting to function under the Rules of the Supreme Court of Oklahoma, filed a complaint against Appellant before the Executive Council of the Bar Association. Mr. Floyd Rheam, a member of both the Executive Council and the Central Committee was appointed Trial Examiner.

The case was heard by Mr. Rheam and he reported his findings, conclusion, and recommendation of disbarment to the Central Committee which in turn reported recommending disbarment to the Executive Council. The Council in turn recommended disbarment to the Supreme Court of Oklahoma. Appellant filed exceptions to the report and the court considered the matter on briefs and oral argument.

The Supreme Court of Oklahoma is composed of nine members. Of the nine, five are recorded as concurring with Justice Williams, who wrote the opinion. One is recorded as dissenting. The position of the other two does not appear as of record.

Subsequent to the mandate of the Supreme Court being issued, on petition of Appellant it was recalled and

execution stayed pending the perfection and disposition of this appeal.

After notice of appeal was filed, Appellant petitioned for a writ of mandamus in the Supreme Court of Oklahoma in order to complete the record to be certified to this Court. Because of the delay occasioned by the felt necessity to ask for mandamus, Appellant petitioned the Oklahoma Court for an extension of time in which to docket his appeal. Both of these petitions were denied.

This statement of facts is reduced to its bare-bones in order to avoid repetition. Additional facts appear in the context of successive portions of this Jurisdictional Statement.

HOW THE QUESTIONS WERE RAISED

For the convenience of the Court, the way in which each of the questions was raised will be treated under the corresponding number of the question.

Question 1.

This question involves the proposition that the Rules of the Supreme Court of Oklahoma under which the matter was handled provide alternative routes that the Executive Council or Central Committee may take in proceeding. Further, in spite of the fact that the charge was a serious one, the Bar Association chose that style affording Appellant the least opportunity to defend himself.

The following matters were objected to at various stages in the proceedings. Appellant objected, in his Answer

to the Complaint, that the Executive Council had held no preliminary hearing before charges were preferred against him (Tr. Vol. 1, p. 5). This matter was raised again in his Memorandum Brief submitted to Mr. Rheam, the Trial Examiner (R. p. 220). This position was reiterated in his Motion for Oral Argument before the Executive Council upon consideration of the Trial Examiner's recommendation (R. p. 229), and in his Notice of Appeal and Exceptions, paragraph 7, filed in the Supreme Court (R. p. 2).

He objected that he had not been furnished with a copy of the report of the Trial Examiner until after the matter had been considered by the Central Committee and referred to the Executive Council. These objections appear in his Petition for Writ of Prohibition (R. pp. 231-237), his Motion to Dismiss, paragraphs 17 and 18 (R. p. 11), and his Notice of Appeal and Exceptions, paragraphs 9, 10 (R. p. 15).

He asked for and was denied oral argument before the Executive Council, Motion for Oral Argument (R. p. 229) and see his Motion to Dismiss, paragraphs 19 and 20 (R. p. 11) and Notice of Appeal and Exceptions, paragraphs 10 and 11 (R. p. 15).

These matters were all considered by the Supreme Court in its opinion as a part of its answer to Appellant's contention that the rules as applied to him were repugnant to the Due Process Clause (Appendix A, pp. xxix-xlii and more particularly, pp. xxxii-xxxv).

Question 2.

In this question, the propriety of mixing, in the Executive Council or Central Committee or members thereof, the roles of indictor, prosecutor, and Trial Examiner, is presented. This question was raised by Appellant in his Motion to Dismiss, paragraph 24 (R. p. 12) and his Notice of Appeal and Exceptions, paragraph 24 (R. p. 17).

This question was considered by the Supreme Court in its opinion as a part of its answer to Appellant's contention that the Rules as applied to him were repugnant to the Due Process Clause (Appendix A, pp. xxix-xlii, and more particularly, pp xxxi-xxxii).

Question 3.

In this third question, the central problem is this: Are the Rules as applied to Appellant repugnant to the Due Process Clause insofar as they permit the Honorable Stephen S. Chandler, Chief Judge of the District Court, Western District of Oklahoma, and his actions to exercise considerable influence in the course of the proceedings without his ever becoming formally involved in the proceedings.

The earliest appearance of Judge Chandler in this proceeding, as such, was the introduction (in the hearing before the Trial Examiner on the disbarment charge) by the Bar of the proceedings, depositions and exhibits of the hearing on Appellant's claim in the bankruptcy matter.

Appellant objected to the introduction of this evidence at the hearing. In particular, he objected to the introduction of the transcript of the record of the hearing including comments of Judge Chandler on the conduct of Appellant (Tr. Vol. 1, pp. 96-99, and more particularly p. 99). He objected to the testimony of the Court Clerk that Judge Chandler had ordered the Appellant disbarred from practice in Judge Chandler's Court (Tr. Vol. 1, pp. 100-101). An inspection of the record would show that these objections were repeatedly raised. But it is sufficient to show that, this question of the propriety of introducing Judge Chandler's reactions and rulings were raised in and considered by the Supreme Court of Oklahoma, as shown by its opinion in a part of its answer to Appellant's contention that the Rules, as applied to him, violated the Due Process Clause of the Federal Constitution (Appendix A, pp. xxix-xlii, and more particularly pp. xxxvi-xxxviii).

If one were reading the record chronologically, he would next discover that it was not revealed until much later that Judge Chandler was, in fact, the moving party in the disbarment proceeding. It was not until the Executive Council made its report to the Supreme Court that it was revealed that Judge Chandler had prompted the action by the Bar Association (R. p. 1). While it is recited therein by the Executive Council, that the "complaint states that this proceeding was begun on November 13, 1958, when it considered a letter from Judge Stephen S. Chandler," the complaint is in fact devoid of any such statement (Tr. Vol. 1, pp. 2-4).

This matter was likewise raised and considered in the Supreme Court as shown by its opinion in a part of its answer to Appellant's contention that the Rules as applied to him violated the Due Process Clause of the Federal Constitution (Appendix A, pp. xxix-xlii, and more particularly, pp. xxxvi-xxxviiii).

Question 4.

This question involving the predisposition of the Trial Examiner, as demonstrable from the record, having resulted in the production of a warped record, involves elements contained in several other of the questions herein presented. To avoid repetition, Appellant in this section points to the most central elements.

The Supreme Court of Oklahoma considered the argument of Appellant, as indicated in 2, above, that Mr. Rheam, the Trial Examiner, was a member of the Committee which preferred the charges and was appointed by that committee.

The Supreme Court also considered Appellant's contention that the Trial Examiner had refused to consider testimony that Appellant had told others of the existence of the contract before any dispute about it arose (Appendix A, p. xlii). In fact, the Trial Examiner even refused to accept a brief on the question (Tr. Vol. 2, p. 8).

It has been previously noted in 2, above, that the Oklahoma Supreme Court had considered Appellant's contention that it was error to admit the record of the proceedings in the claim in bankruptcy, thus denying the

right of cross-examination, especially when that record contained argument of counsel and the disallowance of the claim on the basis of fraud and an oral summary disbarment of Appellant.

Questions 5, 6, and 7

For brevity, these three questions are treated together as they are closely related. The Appellant raised all of the elements of these three questions while the matter was still before the Trial Examiner or Referee as he is referrd to in Volume 2, of the Transcript.

Counsel for the Bar Association indicated in his opening statement that the Bar Association would concede that Complainant had a contract to perform the work, that he had spent a good deal of time. He further indicated that the Association would not question whether the fee claimed was reasonable or not (Tr. Vol. 1, p. 15). At that time, Appellant claimed surprise on the basis that he was prepared to defend against the charge that Appellant "did * * * file a false and fraudulent claim * * *" (Tr. Vol. 1, pp. 17-18).

While counsel for the Bar and the Trial Examiner, both, and repeatedly "stipulated" or "found" during the hearing that Appellant had had an arrangement with the bankrupt, had perfomed valuable services for the bankrupt, and that his claim for a million dollars was reasonable, the most revealing record of it is at (Tr. 1, Vol. 1, p. 510) where this "Freudian Slip" of the Trial Examiner appears:

"By the Court: But we are not trying the issue of what is reasonable compensation. I think we could even stipulate that $1,000,000., *I mean if I were counsel for the bar,* I think maybe a stipulation that $1,-000,000.00 could be a reasonable fee for the work he did. Even $2,000,000.00, it wouldn't make any difference as to the amount of the service or the amount of the fee. Does counsel so stipulate?" (Emphasis supplied.)

Counsel did!

Appellant raised the question of the exclusion of evidence as to Appellant's intent to deceive the court in the bankruptcy matter at the time of the hearing (Tr. Vol. 2, p. 88), and again in his Memorandum Brief to the Trial Examiner (R. p. 220).

He raised the question of the amendment of the Complaint "in form of proof offered" in his Motion for Appropriate Relief (R. p. 218). The response, to which, was an order of the Trial Examiner, without hearing, permitting the Bar Association to withdraw its Motion to Amend (R. p. 219).

These matters were raised again in the Supreme Court by Appellant's Notice of Appeal and Exceptions, paragraphs 5 and 6 (R. p. 14).

The Court was seemingly cognizant of these matters as reflected by its opinion (Appendix A, pp. ix, xi, xix and xlii).

THE QUESTIONS ARE SUBSTANTIAL—GENERAL CONSIDERATIONS

There are persuasive reasons aside from the merits of this particular case why this Honorable Court should note probable jurisdiction and hear and decide this case on its merits. This Honorable Court in *Lathrop* v. *Donohue*, 367 U.S. 824, 81 S.Ct. 1826, had occasion to note the growth in number of integrated bar associations. An almost universal feature of the integrated bar pattern is the use of the machinery of the bar association as an arm of the court in disciplinary matters and in matters of bar admissions. Even in some of those states, where the bars remain unintegrated, the courts are using committees of the bar associations as arms of the court in disciplinary matters. (See, *e.g.*, Illinois Supreme Court Rule 59, published in Smith-Hurd Illinois Annotated Statutes, Ch. 110, § 101.59, providing for extensive use of the machinery of the Illinois and Chicago Bar Associations in disciplinary matters).

At a previous time, the role of the bar associations was limited to the role of complainant or plaintiff in a suit largely adversary in nature. The Court itself heard the evidence or appointed a referee to conduct the hearing. But in the new era of disciplinary proceedings, in many states, the whole matter is placed in the bar association machinery until after the critical stages of the hearing of the evidence and the findings, conclusions, and recommendations as to the disposition of the matter have already been accomplished.

Thus, in the new era of disciplinary matters, a radically different balance exists between the accuser and the accused than existed when disciplinary proceedings were heard by a court or its referee—and this new balance may well place the accused at disadvantages unknown under the previous system.

The rules establishing these new disciplinary procedures were promulgated in a number of the states by the Supreme Court of that state. This is true of the rules in the case at bar. In all such instances, when the State Supreme Court sits in judgment on the validity of such rules, it is sitting in judgment of its own rules. The State Supreme Court's judgment on the validity of their own rules could not be expected to have the same degree of objectivity that its judgment would have on the work product of another body.

This Court, and this Court alone, offers the opportunity for an objective independent judgment as to whether rules adopted by State Supreme Courts, as applied to members of the bar in disciplinary proceedings, are repugnant to the Federal constitutional guarantees of due process.

This Court has not, thus far, in any real measure, laid down guide lines by which states may judge the appropriateness of procedures which they have adopted or may have under consideration.

The Appellant received a letter from the American Bar Association, soon after the decision in the case from which this is an appeal, informing Appellant that because of his disbarment, he was, under the Rules of the American

Bar Association, being dropped from the rolls of that Association. Appellant then wrote the Association informing it of his pending appeal to this Court and of the stay which the Oklahoma Supreme Court had ordered pending that appeal.

Appellant received in return a letter from Joseph D. Stretcher, Executive Director of the Association, dated November 21, 1963, and saying in part:

> "No case has heretofore come to our attention in which the United States Supreme Court has entertained jurisdiction to review the order of the highest court of a state disbarring a lawyer admitted to practice in that state from the practice of law. Under these circumstances, we have quite naturally assumed that a certification of the final order of the state Supreme Court is in the terms of our constitution 'a final order.'"

The above statement, from a person in the position of Mr. Stretcher, causes one to wonder how wide spread is the opinion that State disbarment proceedings are not subject to the limits of due process imposed by the Federal Constitution.

It would seem that a firm pronouncement by this Court that disbarment proceedings must measure up to federal due process would be highly desireable at this time.

In *Theard* v. *United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, this Court said:

> "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in Konigsberg v. State Bar of California, 352 U.S. 252, 77 S.Ct. 722, and Schware v. Board of Bar

Examiners, 353 U.S. 232, 77 S.Ct. 752, to sit in judgment on Louisiana disbarments * * *."

These cases involved, not proceedings in disbarment, but rather, the denial of admission to the bar. The basis of the finding that due process had been denied in each case was the want of evidence to support the finding of failure to meet the standards for admission.

Surely, this Court in the quoted statement from the *Theard* case did not mean to imply that it was limited in its review to the exact due process questions examined in *Konigsberg* and *Schware*. There are other aspects of federal due process involved in disbarment proceedings. This Court ought to take this opportunity to spell out, to the profession, some of the other standards of federal due process in relation to disbarment proceedings.

THE QUESTIONS ARE SUBSTANTIAL—AS TO APPELLANT

Appellant turns now to an examination of the significance of each of the individual questions raised. The numbered sections below correspond to the number of the questions to which the analysis is directed.

1.

The Bar Association's action in the selection among alternative procedures was arbitrary and capricious.

The Rules of the Supreme Court of Oklahoma governing the Bar Association in preliminaries of the disbarment procedure, allow alternatives at various steps. Perhaps this

can be justified on the theory the procedure should be adaptable to fit the widely varying circumstances of matters brought to the attention of the governing body of the bar. But in selecting the alternative to be used, the governing body of the association ought to exercise its sound discretion in selecting that alternative indicated by the nature of the case.

The charge in the instant case was that the Appellant had filed a false and fraudulent claim in a bankruptcy matter. This charge (as it was to be learned by Appellant after the preliminaries were completed *in toto*) was contained in a letter from Judge Chandler in which he recited that he had disbarred Appellant from practice in his Court. Obviously, these were serious charges and equally obviously, if proven true, the discipline to be imposed would be severe. At this point, there were many alternatives which the Executive Council or Central Committee could have selected. Among the alternatives was to order an investigation and even to afford Appellant an opportunity to be heard during the investigation. Rules, Art. 7, pt. 1, § 4 (Appendix D, p. lvii). There is no record of any investigation being conducted, and clearly the Appellant was not permitted to participate therein.

The next important step of alternatives involves the selection of the person or persons to hear the charges. Here, the governing body has wide latitude; it could select any of the district Grievance Committees or an "Examiner." There is no limitation upon who may serve as Examiner. Presumably any member of the Association would be eligible, Rules, Art. 7, pt. 1, § 7 (Appendix D, p. lix).

But, Mr. Rheam, a member of the Central Committee and the Executive Council, one of which bodies preferred the charges, was selected by that body to hear the matter. This feature will be discussed at length in the next section. It is mentioned here to show the pattern followed.

Following the hearing before the Trial Authority (When the matter is not heard by the Executive Council) the Trial Authority is to make a written report to the Executive Council.

> "The report shall consist of findings of facts on all pertinent issues, conclusions of law, and a recommended disposition of the case, including disciplinary action if any, and shall be accompanied by the original or a copy of the pleadings. A copy of the report shall be furnished to the trial attorneys, to the person bringing the charges and to the attorney for the respondent, if he be so represented, if not, then to the respondent * * *." Rules, Art. 7, pt. 1, § 17 (Appendix D, p. lxiii).

> "The Executive Council may adopt, modify or set aside the proposed findings of fact, conclusions of law, and recommended disposition, including disciplinary action. If disciplinary action is recommended by the Executive Council, it shall file its final report with the Supreme Court." Id. § 18 (Appendix D, pp. lxiii-lxiv).

A reading of the above excerpts from the Rules would seem to make it clear that it was, at least, within the power of the Executive Council to hear Appellant before it acted upon the Trial Authority's report. Why else would the Rules require that Appellant be furnished with a copy of the report of the Trial Examiner?

The record of the hearing before the Trial Examiner ran to almost 700 pages, including exhibits. One single copy of this record was available to the members of the Executive Council. Yet, Appellant was denied oral argument before the Executive Council and indeed was not even supplied with a copy of the Trial Examiner's report until on August 28, 1959, when he demanded a copy thereof. Prior to that time, on August 13, 1959, the Central Committee (which is authorized to perform any function bestowed upon the Executive Council) had already acted upon the Report of the Trial Examiner (who was a member of that committee). Subsequently on October 15, 1959, the Executive Council, having refused Appellant's request for oral argument "rubber-stamped" the action of the Central Committee.

Appellant will not extend the argument under this section by pointing to other instances in which the alternative selected in the course of the preliminaries minimized Appellant's opportunity to defend himself.

The above would seem sufficient to demonstrate that those charged with the responsibility of controlling the course of the preliminaries did not extend themselves to see that Appellant was accorded that degree of due process which was in their power to give and was plainly indicated by the seriousness of the matter, the volume of evidence and the complexity of the case. The failure of those persons so to do amounts to caprice and an arbitrary exercise of their discretion.

2.

The combining in one body or members thereof of the role of accuser, prosecutor and judge was repugnant to the due process clause.

The Central Committee or the Executive Council preferred the charges in this case. Mr. Rheam was a member of both these groups. Mr. Rheam was appointed by the group, which preferred the charges, to be the Trial Examiner. This was a most unusual procedure. A survey of the disbarment proceedings referred to the Oklahoma Supreme Court since the time of the integration of the Bar fails to reveal another instance in which a member of the Executive Council was appointed as the Examining authority. The cases checked were: *State* v. *Hatcher*, 201 Okla. 683, 209 P.2d 873; *State* v. *Hamilton* (Okla.), 274 P.2d 383; *State* v. *Nix* (Okla.), 295 P.2d 286; *State* v. *Tallent* (Okla.), 299 P.2d 162; *State* v. *Taylor* (Okla.), 302 P.2d 975; *State* v. *Massad* (Okla.), 334 P.2d 787; *State* v. *Ablah* (Okla.), 348 P.2d 172; *State* v. *Hamilton* (Okla.), 348 P.2d 181; *State* v. *Miller* (Okla.), 348 P.2d 183; *State* v. *Grimes* (Okla.), 356 P.2d 734; *State* v. *Woodward* (Okla.), 362 P.2d 960; *State* v. *Mason* (Okla.), 380 P.2d 961; *State* v. *Trower* (Okla.), 381 P.2d 142; and *State* v. *Dugger* (Okla.), 385 P.2d 486. With the single exception of *State* v. *Woodward*, *supra*, in which the Trial Examiner is not otherwise identified, it is clear that a hearing authority other than a member of the Executive Council or the Central Committee was appointed. In at least nine of the fifteen, a committee rather than a single individual was the hearing authority. In several, retired Judges of the State District Courts were selected.

The selection of one of their own number by the governing body was a decided departure from past practices.

A most revealing remark was made by Counsel representing the Bar at the close of his summary before Mr. Rheam. He said:

> "We feel that this case demands and calls for disbarment and this is the recommendation of the officials of the Bar who have had the responsibility of this case to this point. We now pass the case and this recommendation into your hands" (Tr. Vol. 2, p. 191).

Now, if "We" are the trial counsel and his assistant, *who are the "officials of the Bar who have had the responsibility of this case to this point and recommend disbarment?"*

The only officials previously involved were the members of the Executive Council or Central Committee which preferred the charges and selected Mr. Rheam from their own number to hear the case. They are to review Mr. Rheam's findings and recommendations and even before he has made them, they are recommending to Mr. Rheam that the Appellant be disbarred.

The case of *In re Schlesinger's Appeal*, 404 Pa. 584, 172 A.2d 835, resembles in its essential aspects, the case at bar. Indeed, as to the "stage in the proceedings" aspect, the cases are identical. That is, the Pennsylvania Supreme Court in that case was reviewing the action of a common pleas court which was the court of first instance just as this Court sits now in review of the action of the Oklahoma Supreme Court which was the court of first instance in the case at bar. In that case, the Committee on Offenses

bore to the common pleas court, the same relation that the Executive Council and Central Committee bear to the Supreme Court of Oklahoma in the case at bar.

In the *Schlesinger* case, the Committee on Offenses lodged the formal complaint upon which the lawyer was tried. It appointed a Sub-committee of its own members who then heard the testimony, heard oral argument, considered briefs and reported to the whole Committee on Offenses, recommending disbarment. The Committee on Offenses adopted the report of the Sub-committee and filed the report in the common pleas court. Exceptions were filed and heard by three judges. This Court (one member having died) dismissed the exceptions and recommended disbarment to the sixteen man Board of Common Pleas Judges. This Board adopted the recommendation and ordered the lawyer disbarred.

This case differs, from the one at bar, only in that the hearing authority consisted of three rather than one and in that the reviewing court's recommendation was itself "reviewed" by a much larger Board of Judges.

If anything, greater emphasis was placed on extending procedural due process to the attorney in the *Schlesinger* case than in the case at bar.

In the *Schlesinger* case the Pennsylvania Court said:

> "Here, a member of the bar, charged with unprofessional conduct by a bar Committee on Offenses, was prosecuted on the Committee's complaint before a Subcommittee, composed of three members of the Committee, sitting as the trial tribunal. In such a procedure, so contrary to traditional American judicial

concepts, unfairness was, *ipso facto*, inherent; it was fraught with the possibility of temptation to each member of the trial tribunal to favor, consciously or unconsciously, the prosecuting body which appointed him and of which he was a member. The record as a whole contains a reasonable basis for doubt as to whether impartiality on the part of the members of the tribunal was completely absent and suggests an unsympathetic predisposition toward the appellant. Moreover, a predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely, 'a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true' was implicit in the proceedings before the prosecutor's own Subcommittee which resulted in appellant's disbarment." 172 A.2d 835 at 841.

The language which the Supreme Court of Pennsylvania is quoting is taken from this Court's opinion in *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, wherein the Court said:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies

> the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13."

Appellant would also call this Court's attention to *Queen* v. *London County Council* (1892), 1 Q.B. 190, and *State ex rel Getchel* v. *Bradish*, 95 Wis. 205, 70 N.W. 172, both of which were cited by this Court with approval in the *Murchison* case.

In the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S.Ct. 445, the question was merely one of statutory construction. Wong contended that the Administrative Procedure Act of 1946 was applicable to deportation proceedings. The Act sought to eliminate certain objectionable features of administrative procedure many, of which, centered around the embodying in one person or agency, the combined roles of prosecutor and judge. Whether the Administrative Procedure Act was applicable to deportation hearings depended upon the construction of the Immigration Act. This Court rejected the construction urged by the Government, saying:

> "Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deporta-

> tion hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where le s vital matters of property rights are at stake." Id. at 445, 70 S.Ct. at 454.

It would therefore seem that the admixture of the roles of indictor, prosecutor and judge all rolled into the members of a single body presents a substantial question of whether the Rules as applied to Appellant are repugnant to the Due Process Clause of the Fourteenth Amendment.

3.

The admission of hearsay evidence denying the right of confrontation, especially under certain special circumstances herein present, was repugnant to the due process clause.

This disbarment is the direct outgrowth of the action of the Honorable Stephen S. Chandler in summarily disbarring the Appellant from practice in the United States District Court for the Western District of Oklahoma. That this disbarment was summary is shown by the transcript of the record of the hearing on the claim filed in bankruptcy by the Appellant. The transcript of this record was admitted in evidence in the disbarment hearing (Tr. Vol. 1, pp. 320-428, and more particularly p. 425).

The impropriety of this summary disbarment was (subsequent to the judgment from which this is an appeal) called to the attention of the United States Appellate Court for the Tenth Circuit by a Petition for Mandamus. Below is a portion of the Order entered by the Tenth Circuit:

> "The application to file a petition for mandamus is denied. Although petitioner, a lawyer, alleges that he has been disbarred by an order of the District Court for the Western District of Oklahoma, entered summarily, and without a hearing, a procedure prohibited under the principles set forth in Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, it is apparent that full relief is available to petitioner for redress of any such void judgment by customary procedures originating at the trial level."

The entire instrument appears in the record (R. p. 178).

Subsequent to the issuance of this order, Appellant on September 20, 1963, filed a Motion to Vacate this Void Order disbarring him from practice in Judge Chandler's Court.

Judge Chandler has ever since that time refused to set the matter for hearing. Appellant suspects that Judge Chandler intends to wait, hoping that the Judgment in the State Supreme Court will become final and then the District Court of the Western District of Oklahoma can, without a hearing on the merits, proceed to disbar Appellant from practice in that Court.

If that should come to pass, if this Court should refuse to consider this case at length, then the Void Order

of Judge Chandler would have served as a basis for the state disbarment which would in turn permit Judge Chandler to make his summary disbarment stick.

Admittedly, the last paragraph assumes that this Void Order did serve as a basis for the judgment from which this is an appeal. Did it? Look at the record. The Findings of Fact, Conclusions of Law and Recommendations made by Mr. Rheam, the Trial Examiner (R. pp. 5-7) contains this paragraph:

> "4. The evidence shows that the Respondent's claim was denied by the Honorable Stephen Chandler, Judge of the Federal District Court for the Western District of Oklahoma; that he was surcharged to the extent of $5000.00 and that he was disbarred from the practice in the Federal Court. The Respondent paid the surcharge of $5000.00 and prosecuted no appeal from the order denying his claim, surcharging him the $5000.00, and disbarring him from practice in the Federal Court" (R. p. 7).

That Judge Chandler had disbarred Appellant from the Federal Court was certainly not far from the center of Mr. Rheam's consciousness when he made his recommendations to the body of which he was a member. Mr. Rheam is the only person who heard the witnesses. Any review thereafter, was from the transcript of the testimony.

And, indeed, a part of the argument of this section is that due process was denied in admitting the transcript of the hearing on the claim in bankruptcy and the accompanying disbarment into evidence in the State disbarment proceedings. This Court has seemingly never passed on

the question of the propriety of the use, in a disbarment hearing, of the transcript of testimony taken in another case in which the lawyer was a party. It is perhaps needless to say, that the argument against this practice is that it is the admission of hearsay and denies the accused the right of confrontation and cross-examination.

Recently the United States Court of Appeals for the Tenth Circuit had occasion to canvass the authority on the question. It reports in *U. S.* v. *Guidarelli*, 318 F.2d 523, that the authority is split. An examination of the authority there collected failed to reveal any case in which a record of a void order of disbarment was admitted in evidence in another disbarment proceedings, however.

Further, it should be noted that the transcript of the proceedings in bankruptcy was admitted in sections as numerous separate exhibits. The exhibit containing the Judge's ruling that the claim was false and fraudulent and his order of disbarment contains no evidence in any sense of the word. It contains only formalities and the Judge's pronouncements. This exhibit is Exhibit 22 (Tr. Vol. 1, pp. 423-427). An examination of the pages on either side will demonstrate that this exhibit was a separate unit and treated as such on admission. It could have been easily omitted. The only purpose in introducing it was to get into the record this highly prejudicial material of the Judge's remarks.

Further, it is a matter of record in this case that Mr. Loving, the attorney representing the Trustee in Bankruptcy admitted, when his deposition was being taken,

that he and Judge Chandler had "pre-tried" the claim in bankruptcy (Appendix A, p. xxxvii and Tr. Vol. 2, p. 168).

Were some other member of the Federal Judiciary involved such a statement might be hard to believe. But Judge Chandler's capacity to "pre-try" lawsuits with the lawyers representing only one side is a matter of record. See *Occidental Petroleum Co.* v. *Chandler*, 10 Cir., 303 F.2d 55, *cert. denied* 372 U.S. 915, 83 S.Ct. 718, *rehearing denied* 373 U.S. 906, 83 S.Ct. 1288, in which Judge Chandler's lack of judicial restraint has previously been called to this Court's attention.

These matters are called to the attention of this Court in order to show that, whatever may be the general rule as to the admissibility, in a disbarment matter, of testimony taken in other suits, that these extraordinary features of the evidence set it aside as *sui generis*. Under all these circumstances it was patently unfair and a denial of due process to have received it in evidence.

4.

The danger inherent in the possible production of a warped record by a predisposed trial examiner is repugnant to the due process clause of the Constitution.

Appellant must admit that this section and indeed Section 1, is not as strong as he had hoped it would be at the time he drew his Notice of Appeal and framed his questions. The explanation for Appellant's disappointment is simple. Appellant had reason to believe that the minutes

of the Executive Council and/or Central Committee of the Bar Association would contain evidence of the predisposition of those bodies and of Mr. Rheam, toward finding against Appellant. The Rules clearly give Appellant the right to access to those minutes.

> "The orders and minutes of the Executive Council, except with regard to charges or disciplinary proceedings against *other* persons, shall be open to any member of the Association." Rules, Art. 7, pt. 1, § 12 (Appendix D, p. lx).

But, on order of the Executive Council, Appellant's request for a copy of the minutes was denied (R. p. 206).

Appellant then designated the minutes in question as a part of the record to be certified to this Court in his Notice of Appeal.

Upon being informed by personnel in the Office of the Clerk of the Supreme Court of Oklahoma that the Bar Association officials would not give them access to the said minutes, Appellant filed a Petition for Mandamus in the Supreme Court asking that Court to order the Bar Association to make their records available to the Clerk of the Oklahoma Supreme Court and to Appellant. It was Appellant's theory that in disciplinary matters that the Bar was merely an arm of the Court and that the entire procedure was an original action in the Supreme Court of Oklahoma. See Appellant's Brief on his right to mandamus (R. pp. 208-213). When the Court ordered the Bar Association to respond within fifteen days, Appellant became concerned about his dead-line for docketing this appeal. He applied to the Oklahoma Supreme Court under

Rule 13(1) of this Court for an extension of time to docket the appeal planning to bring the matter of perfecting his record to the attention of this Court should the Supreme Court of Oklahoma deny the Petition for the Writ of Mandamus. On January 28, 1964, the Supreme Court of Oklahoma denied both the Petition for Writ of Mandamus and the Petition for Extension of Time (R. p. 214). With the dead-line of February 7, 1964, for docketing the appeal, Appellant not being familiar with securing extensions of time from this Court and the amount of time it might require, Appellant decided to devote the remaining time to the preparation of this statement on what he had and leave it to the imagination of this Court as to what is in those minutes that the Bar Association is so anxious to hide. The Bar represented to the Supreme Court of Oklahoma in their Response to the Petition for Mandamus that they would make the records of the minutes available to Appellant (but not to this Court) (R. p. 199). This Response was filed on January 22, 1964. But as of the date of the writing of this Statement, January 31, 1964, and in spite of a renewed demand, the Bar Association through its Executive Secretary continues to refuse to permit Appellant to have access to the minutes in question.

To return to the main thrust of the argument of this section, the argument is simply this, that when one who sat as an accuser is permitted to sit as the trial authority, there is grave danger that his predisposition will warp the record which is to be reviewed.

This puts the one seeking review at a decided disadvantage at every stage of the process thereafter. Re-

gardless of the scope of judicial review, regardless of how much or little weight is given to the record, the burden of challenging the record is on him who seeks review. It is therefore of utmost importance that the record be made under the supervision of one who is free of all preconceived impressions of the guilt or innocence of the accused.

5, 6, 7

Disbarment based on an abandoned charge of "having filed a false and fraudulent claim" violated the due process clause.

As indicated above, the matters raised by the corresponding questions, are closely related. The division into component parts seemed to facilitate the statement of the whole at the time the Notice of Appeal was drawn.

There is indeed little that can be said concerning these matters that has not been said in the statement of the questions themselves.

The Appellant was accused of having filed a "false and fraudulent claim" in a bankruptcy proceeding. Appellant and counsel prepared to meet that charge. They prepared to show that Appellant had a contract with the bankrupt, that he had spent many years of his own and his staff's time, that he had accomplished what Professors Surrey and Loss of the Harvard Law School had told the bankrupt could not be done, and that he had saved the bankrupt many millions of dollars at great out-of-pocket expense to himself (Appendix A, p. xxiii).

The Bar Association and the Trial Examiner stipulated that all these things were true and were not even issues in the case.

On a charge of filing a false and fraudulent claim, this amounts to stipulating the charge away.

The Appellant offered to submit evidence that he had no intent to deceive the Court in the bankruptcy matter and the Trial Examiner refused to admit it (Tr. Vol. 2, p. 88).

The Appellant sought to show that, well in advance of any dispute over the claim and well in advance of the declaration of bankruptcy, he had discussed the existence of the contract with others. The Trial Examiner indicated that he believed such evidence was inadmissible and even rejected an offer of a brief on the matter (Tr. Vol. 2, p. 9). While the Trial Examiner did admit the evidence, he obviously gave it no weight. The Supreme Court tacitly admits, that the Trial Examiner was in error on this point (Appendix A, p. xlii).

To be told that these matters were irrelevant on a charge of filing a false and fraudulent claim was, the least, completely demoralizing, disconcerting and altogether unfair.

It is interesting to note that after stipulating away the charge of filing a false and fraudulent claim, indeed, after the close of all the testimony, the Trial Examiner granted a motion of the Bar Association that the complaint be amended in "form of proof offered to support its case." The Appellant objected and then moved for a continuance to

defend against any amended complaint that might be filed. This motion was overruled (Tr. Vol. 2, p. 183). At the end of the hearing then, there was an amended complaint which was nowhere stated.

When this matter was subsequently called to the Trial Examiner's attention, he permitted the Bar to withdraw its Motion to Amend and the charge, whose major elements had been stipulated away or declared to be irrelevant, the original charge, was then back in force.

What then remains of the Bar's case? It is stated succinctly by the Court in repeating the Brief of the Bar:

> "May an attorney working under an oral agreement of employment reduce said agreement to writing in order to strengthen his claim for fees and submit the same to the Court as though it had been in existence prior to the dispute or controversy in connection with the fees?"

This question is the crux of the matter as admitted by all.

What was the proof that Appellant did even this? There was some evidence that he referred to the contract as an oral one without adding that it had been subsequently reduced to writing. What is the significance of this omission? To the man who keeps his word and assumes that others will do likewise, the important thing is that he has made an agreement not that it was subsequently reduced to writing.

In addition there was testimony by Mrs. Howard Stephens which the Trial Examiner found to mean that

the stationery upon which the contract was written "was not in existence until September 15, 1955" (R. p. 6). The Supreme Court found the evidence "appears to show that the letterhead * * * was not in existence at least until 1955, probably in September (Appendix A, p. xxvii).

No one would contend that there was any "dispute or controversy" in connection with the fees any earlier than early in 1958.

But of even greater significance is the fact that when shown a copy of the Trial Examiner's Report, Mrs. Stephens denied that her testimony was correctly interpreted by the Trial Examiner. The gist of her affidavit at that time is reported in the Supreme Court's Opinion (Appendix A, pp. xvii-xix). It appears at length in the record (R. pp. 22-23).

Taken all in all, there is precious little left of the Bar's charge that Appellant filed a false and fraudulent claim. The claim, without the existence of the disputed letter-contracts, is admitted to be valid. As to the letter-contract, there is a conclusion that the stationery was not printed until sometime in 1955. This is permitted to prove that the contract was not drawn until sometime in 1958—and the one giving the testimony upon which the conclusion is based, denies that she was properly understood.

CONCLUSION

The federal questions herein involved are substantial. The professional life of a lawyer is at stake. To deprive him of his profession and his personal and professional

reputation is but little less than to deprive him of life itself. But beyond that, a consideration of this Court of the procedural due process questions herein involved would be of service to State Supreme Courts and to the profession as a whole. Therefore, this appeal should be heard and decided on its merits.

Respectfully submitted,

WILLIAM D. FORE,
1310 South Agnew,
Oklahoma City, Oklahoma,

Attorney and Counsel for Appellant.

Of Counsel:
W. HOWARD O'BRYAN, JR.
1012 Hightower Building
Oklahoma City, Oklahoma

February, 1964.

APPENDICES

Appendix A

FILED
In Supreme Court
of Oklahoma.
JUN 18 1963
ANDY PAYNE
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

STATE OF OKLAHOMA, EX REL,
OKLAHOMA BAR ASSOCIATION,
Complainant

-vs- S.C.B.D. 1792

WILLIAM HOWARD (PAT) O'BRYAN,
Respondent

SYLLABUS

1. Attorneys at law are officers of the Supreme Court. Their professional conduct should accord with the high ethical standards of the profession. The Court has inherent authority to regulate the admission of applicants to the practice of law, to administer discipline and, in proper cases, to disbar attorneys for offenses against such ethical standards.

2. The accused in a disbarment proceeding is not entitled to a jury trial.

3. Evidence examined and held that the recommendation that respondent should be disbarred should be and is approved.

Proceedings to Review Recommendation of Central Committee and Executive Council of Oklahoma Bar Association.

[APPENDIX]

William Howard (Pat) O'Bryan, of Oklahoma City, Oklahoma, a member of the Oklahoma Bar Association, was charged with unprofessional conduct, to-wit: violation of Canons No. 22 and No. 29 of the Canons of Professional Ethics of the American Bar Association as made applicable to the professional conduct of attorneys in this State by Rule of this Court. The Association recommended that respondent be disbarred from the practice of law in this State. The recommendation is approved and respondent disbarred.

JOHN L. SMITH,
Oklahoma City, Oklahoma, For Complainant

WILLIAM D. FORE,
Oklahoma City, Oklahoma, For Respondent

WILLIAMS, J:

The question to be determined herein is whether this Court will approve a report of the Oklahoma Bar Association and follow its recommendation that respondent be disbarred from practicing law.

This matter was first brought to the attention of the Bar Association when a Judge of the Federal Court for the District including Oklahoma City, on November 12, 1958, wrote a letter to the Bar concerning respondent's conduct for which he has been barred from further practice in that court.

Respondent had, on March 24, 1958, filed a "proof of debt" in the case of the Bankruptcy of Selected Investments Corporation and Selected Investments Trust claiming that Selected owed him $1,194,027.02 for the reasonable value of legal services performed at the bankrupt's request, most of which allegedly became due on November 18, 1957, and the balance shortly thereafter, and that he had received no sort of security or note or other evidence

of the existence of the indebtedness. An exhibit attached to the claim asserted entitlement to 10% of certain tax savings to Selected.

Respondent had thereafter and on May 21, 1958, filed an amended proof of debt asserting that the debt claimed was "based upon an oral contract which was reduced to writing on October 29, 1954," and "further evidenced by a memorandum agreement dated May 17, 1957," and had attached copies of those two letters as exhibits.

On or about March 3rd to 7th, 1958, and before filing that original claim, respondent had talked by telephone to the Trustee in Bankruptcy and had been told by him that Mr. Carroll's testimony would not be very good to support an oral contract. It was after that (and within some two months from the time of filing of his original claim as above noted) that respondent "found" the purported written contract hereinafter described.

In the hearing before the Trial Examiner from which arose the recommendation presently under consideration herein, the Trustee in Bankruptcy testified repeatedly that respondent called him on the telephone different times after he had been designated as such Trustee and told him that respondent had an oral contract for fees; that it stuck in the trustee's mind immediately that respondent had been operating for a number of years under an oral agreement to represent someone; that he told respondent he would have been better off if he had had a written contract; that he did not instruct respondent "prior to his filing an original claim that it would be much easier for him to have a written contract as distinguished between an oral contract."

Respondent wrote the Trustee in Bankruptcy on March 10, 1958, and before filing his original claim, a thirty-two page letter in explanation of his claim soon to be filed. Therein, (page 4), he stated:

"Inasmuch as neither the officials of the company or ourselves could foresee the extent of the difficulties with which we might be confronted, no agreement could be reached as to the legal fees to be charged. It was understood that our compensation would be based upon a 'reasonable fee' which would be contingent, to some extent, upon the results accomplished.

"I explained to Mr. Carroll that I could not abandon my practice, which had been built over a period of many years, for the sake of any one client; also, that I could not, under the circumstances, determine what would be a reasonable retainer.

"The question of the legal fees to be charged was held in abeyance to be determined, when the results were in, on a reasonable basis with the understanding that in the interim Selected would from time to time allow us reasonable advances, in the form of retainer, to assist us in carrying the costs of our office and correspondingly the cost of carrying on this litigation."

On page 14 of that letter Mr. O'Bryan listed specifically the dates of some 12 or 15 conferences with taxing authorities. On page 22 of that letter he stated:

"We maintain an I.B.M. punched card system and will be able to furnish you with a tabulation of the number of hours devoted to this task. It is my estimation that the time devoted to the Selected tax matters will be in excess of 8,000 hours."

Referring to the Oklahoma State Income Tax angle of Selected's business, on page 28 of that letter, Mr. O'Bryan wrote:

"The fee arrangement in this matter was similar to that in the federal case. In other words, our compensa-

> tion was to be a 'reasonable fee' based upon the results attained.".

Yet he made no mention of the purported letter-agreement of October 29, 1954, in such entire letter of March 10, 1958, to the Trustee in Bankruptcy.

In that same letter of March 10, 1958, to the Trustee in Bankruptcy, to which reference was above made, respondent, at page 22 and 23 thereof quoted two paragraphs from Am. Jur., Vol. 5, Attorneys at Law, IX, Compensation of Attorneys, E. Measure of Compensation or Recovery, § 198, Under Implied Contract, of effect as follows:

> (That) "In the absence of an express contract of employment between an attorney and his client fixing the amount of the attorney's compensation, it is generally held that the attorney is entitled to what his services are reasonably worth, or what has usually been paid to others for similar services. The determination of this depends largely upon the circumstances of the particular case; . . ."

and listing numerous circumstances to be considered in fixing amount of an attorney's fee. On page 31 of that letter he stated that that "quotation . . . eloquently set forth the basis upon which our claim for 'reasonable compensation' is based."

As noted above, respondent herein was the claimant in the Selected Bankruptcy case. His claim came on for hearing in the Federal Court on November 3, 1958. A special master had been appointed in the case. However, the Judge of the Court recessed a jury trial and heard the matter personally. Respondent was given an opportunity to testify concerning the validity of his amended claim and the trustee in bankruptcy, who had been appointed by such Court, contested the validity thereof.

[APPENDIX]

The letter of October 29, 1954, being complainant's Exhibit 23 herein and plaintiff's Exhibit No. 36 in the Federal Court Proceeding wherein respondent sought to establish his claim as amended, and which was attached to his amended proof of debt as Exhibit "B" is as follows:

"Law Office of

O'Bryan And O'Bryan
Hightower Building
Oklahoma City, Oklahoma
CEntral 2-6151

"W. H. Pat O'Bryan
W. Howard O'Bryan, Jr.
Donald L. O'Bryan

October 29, 1954

CONFIDENTIAL

"Mr. Hugh A. Carroll,
312 Park Avenue
Oklahoma City, Oklahoma

"Dear Mr. Carroll:

"This will confirm my understanding of the agreement reached by us relative to our representation of the Selected Investments group in the Federal Income tax matters now pending and the compensation to be paid to us in relation thereto.

"It is our understanding that we are to render whatever legal services may be required of us in connection with these matters—including all years in which the issues raised may be involved, to the end that the income tax problems of the Selected group may be brought to a current status.

"At the time of our employment it was impossible to anticipate what might be required of us—at that time it was agreed that this matter would be held in abeyance until an intelligent approach could be made to the subject.

"A few days ago we reached an agreement as to the compensation to be paid to us, which you have asked that I confirm to you; my understanding of this agreement is as follows:

"1. We are to receive a total fee equal to 10% of the amount of the tax savings. The term 'savings' is to mean the total amount which the government would collect under their theory of the cases minus the amount of tax that might ultimately be paid.

"2. We are to receive reasonable retainer advances from time to time as the work progresses; the amount of the retainer paid to us shall constitute the minimum fee.

"3. Selected is to reimburse us for reasonable costs advanced by us—such as filing fees, court costs, printing, photostats, traveling expenses, etc. Such expense reimbursements are not to be charged against our fee.

"If the foregoing conforms to your understanding, please sign the enclosed copy of this letter and return the same to us.

Yours very truly,

/s/ W. H. Pat O'Bryan
W. H. Pat O'Bryan

"This is my understanding
of our agreement.

/s/ Hugh A. Carroll
Hugh A. Carroll"

In the Federal Court hearing both the Judge and counsel for the trustee questioned respondent concerning his claim for fees and at an adjourned session on November 10, 1958, the Judge announced a finding that the evidence

clearly established that the March 24, 1958, claim and May 21, 1958, amendment thereto were fraudulent; found Mr. O'Bryan's sons had no responsibility with reference thereto and absolved them; granted the Trustee in Bankruptcy judgment on a counter claim for return of $5,000.00 or half of a $10,000.00 payment that had been made to Mr. O'Bryan as expense money or advancement on fee for work on the tax problems Selected had with the Oklahoma Tax Commission; denied other relief sought by the Trustee; and orally announced that he was barring respondent from practicing ever again in that Court and that it was his "duty to notify the Oklahoma Bar Association of the facts . . . for whatever action they care to take." Two days later he wrote to the Bar Association the letter to which we have hereinabove referred.

The Executive Council of the Oklahoma Bar Association assumed original jurisdiction of the matter, authorized the filing of a formal complaint, designated Mr. Floyd L. Rheam of Tulsa, Oklahoma, one of its members, to hear the matter for the Executive Council, and designated Mr. John Lee Smith, as attorney of Oklahoma City, Oklahoma, as prosecutor for the Bar Association.

A complaint, attested by the Executive Secretary of the Bar, but not sworn to, was signed by Mr. Garrett Logan, then President of the Oklahoma Bar Association. Therein it was alleged that Mr. O'Bryan on the respective dates above shown had filed said proof of debt and amended proof of debt in the Selected Bankruptcy case; that both of such instruments were false and fraudulent and were "filed by the said respondent for the purpose of misleading said Court;" that such acts constituted professional misconduct, a breach of the respondent's oath of attorney at law and were "in direct violation of Canons 22 and 29 of the Canons of Ethics adopted by the Supreme Court of the State, . . " etc.

Respondent denied the charge in his answer and by motion asked that the proceedings be made public. Such motion was granted.

The case came on for trial on March 2, and 3, 1959, before Mr. Floyd Rheam, Trial Examiner. Some of the Federal Court proceedings and exhibits and some depositions were received in evidence, the testimony of witnesses for the respective parties adduced and argument on their behalf presented.

Complainant at the conclusion of the taking of evidence by the trial examiner moved that the complaint be amended to conform to the proof offered to support its case. That motion was granted by the trial examiner.

Thereafter, the trial examiner made findings of fact and conclusions of law of effect that respondent was guilty of the charge and recommended, as did the Central Committee and Executive Council of the Bar Association, in turn, respectively, that respondent be disbarred from the practice of law in this State.

Respondent, a man of family and 57 years of age, has been a member of the Bar of Oklahoma since about January, 1936, and a Certified Public Accountant since about May, 1931. Prior to February 9, 1953, respondent was contacted by employees of Selected with reference to helping Selected extricate itself from tax difficulties in which it found itself involved with the U. S. Government. He had several conversations with some of Selected's officials including its president, Mr. Carroll, and on or about the latter date agreed to assist Selected in the named respect.

Altogether there were some 35 or 40 separate companies, corporations and entities of the Selected group. It took quite a lot of questioning, discussion and study of trust instruments, articles of incorporation, by-laws et cetera for respondent to become fully advised as to the inner-work-

ing and inter-workings of the various involved entities. Then a lot of computing of income, amounts of expenses and deductions and amounts of taxes owing to the Federal Government by the respective entities for the respective years from 1950 through 1956, both inclusive, was required.

Respondent emphasizes that he was not able, at an early stage of their conferences, to quote Mr. Carroll a figure as to what he thought would be a reasonable amount to expect by way of a total attorney's fee for work expected of him in connection with settling the Government's tax claim against Selected.

One of the basic factual points of contention between the parties to this case is whether the purported letter-agreement of October 29, 1954, signed by respondent for himself and Mr. Carroll for Selected, was actually signed by those two men at or about or within any reasonable time next after its date as respondent contends, or whether it was signed by them, at some later time, as when the bankruptcy proceeding was either filed or impending.

Basically, it is the contention of complainant that respondent had no such letter in his file and in fact that same did not exist at any time prior to the filing of the receivership or bankruptcy proceedings, but that such letter was in fact uttered by respondent and Mr. Carroll between the latter time and May 21, 1958, when same was incorporated by respondent in his amendment to claim in the bankruptcy court by reference thereto.

Mr. Smith, for complainant, at the commencement of the Bar trial, made a complete opening statement, a small portion of which is quoted at this point:

> ". . . This is the sole charge being made by the Bar Association, that these instruments were false, fraudulent, and misleading. Specifically, a letter which was introduced in evidence and which was attached to the rider of these pleadings . . ."

Mr. Smith admitted that respondent worked for Selected Investments he assumed under some sort of agreement and said he did not deny respondent spent a great deal of time in his employment on behalf of this client; said he made no contention as to whether a contingent fee as claimed in the Federal Court for ten per cent of several million dollars would be reasonable or not and further said, "The sole issue before the Court is whether the instrument filed by the Respondent was a false and fraudulent instrument, calculated to mislead the Court."

The immediate problem here, as hinted at by the foregoing recitation, stems from the fact that respondent filed in the Federal Court bankruptcy case his original sworn claim for a reasonable fee of ten per cent (10%) of taxes and interest saved to Selected, based upon an alleged oral agreement for which he had no manner of security or note or other evidence whatsoever, and that some two months later (or May 21, 1958), he filed a sworn amendment to such claim, based upon a letter he had meanwhile "found" in his files which was dated and he claimed was written and signed by Mr. Carroll and himself some 3½ years earlier and on or about or soon after October 29, 1954, which he had had somewhere in his files all the time, and about which he had forgotten but then later remembered.

The engraved letterhead upon which that letter was typewritten, together with the date of such letter, constitutes the center of interest of the parties and the factual crux of this lawsuit.

Respondent stoutly defends the authenticity of the letter and the existence of both the letterhead and such letter upon the purported date of the letter or within a relatively short time thereafter.

Mr. O'Bryan testified that he discussed the matter of fee arrangements with no one of Selected's officials or em-

ployees except Mr. Carroll. He said Mr. Neal, the Trustee of Selected (as distinguished from the Trustee in Bankruptcy) knew that Mr. O'Bryan was working on the tax case and what was involved in it but that the fee arrangement was never discussed when anyone else than Mr. Carroll was present.

Mr. O'Bryan testified of effect that at about the time (October 20, 1954) he filed the memorandum brief to which reference has been made hereinafter, with the U. S. Government tax authorities, he reached an agreement with Mr. Carroll on his fee which was written up in the form of the "letter dated October 29, 1954, on the stationery of O'Bryan & O'Bryan, which sets this forth, and is signed by Mr. Carroll and myself." Later in his deposition testimony Mr. O'Bryan stated, "I came back to my office, wrote up the memorandum, sent it over there to him, it was signed and sent back to me."

In the Federal Court hearing, the Judge inquired of Mr. O'Bryan and the following proceedings were had:

* * * *

"THE COURT: You never entered into any other contract about Federal taxes?

"THE WITNESS: No.

"Q. (By Mr. Loving.) Mr. O'Bryan, in this memorandum of March 10, you state that your contract was oral, and about two months later you file this amended claim and attach to it a copy of this alleged agreement.

* * * *

"Q. Was that letter in existence on the date that you filed that claim?

"A. It certainly was.

* * * *

"A. I filed my claim later on because I could not find those agreements.

* * * *

"A. (Interrupting.) I originally had an oral argument.

"Q. You made no mention of having a written agreement anywhere in this letter.

"A. Well, now I would have to read the letter to answer that."

In the same hearing, Mr. O'Bryan testified as follows:

"The question of settlement of the fee in this matter was being negotiated with Mr. Carroll shortly after the rendition of the final Revenue Agent's report on November the 18th, 1957, . . . Now, before we could get a settlement of our fee worked out with Mr. Carroll, the receivership proceedings happened, and then the bankruptcy proceedings, and so that is the way it stands at this time . . ."

Only four months and some twenty days prior to the filing of his said original claim (Nov. 4, 1957), respondent had written a memorandum to Mr. Carroll, Selected's President, suggesting that he believed he had saved Selected $5,000.000.00 in Federal income taxes and thought he should perhaps receive a fee of 5% thereof, ($250,000.00).

In that hearing, the attorney for the Trustee in Bankruptcy elicited on cross-examination that respondent on November 4, 1957, in a memorandum to Mr. Carroll, to which reference has hereinabove been made, suggested that a fee to himself of 5% of $5,000,000.00 Federal income taxes saved would not be unreasonable.

Respondent explains that when he made that suggestion he had in mind the possibility of continuing to do

tax and legal work for Selected and thereby obtaining continuing employment for his force of some fifteen employees over a period of some ten more years.

On a preceding page hereof has been copied the purported letter-agreement of October 29, 1954, between respondent and Mr. Carroll supposedly on behalf of Selected. It is to be noted that the letterhead upon which same was typed reads in part, "Law Office of O'Bryan and O'Bryan and in the upper left corner appear three names, towit: W. H. Pat O'Bryan, W. Howard O'Bryan, Jr., and Donald L. O'Bryan.

Mr. O'Bryan now says that the agreement for him to receive 10% of tax savings as a fee was reached when the purported October 29, 1954, letter was written. He testified as follows:

> "Now, prior to this time, I had requested or suggested a fee of 15 percent as against a retainer of $50,000.00. Mr. Carroll would not agree to that. He thought it was a little bit too much. He did agree to a 10 percent fee . . ."
>
> * * * *
>
> "Now, I do not know, if the Court please, the exact date that that was reduced to writing. The agreement was reached at the time that we filed our first brief, that is Exhibit 35, and I made penciled notes of it, but we were in the—we—well, we were awfully busy and as will frequently happen in any case, you lay it back for something you are going to do later on. But, nevertheless, that contract was dated the date that we reached our agreement, and that does set out what my agreement with Mr. Carrol was."

Respondent argues that lawyers and business people come to agreements and reduce them to writing later and

often date their instruments back to time of original agreement. This is quite true.

But Mr. O'Bryan testified repeatedly of effect that the investigation of the terms of the corporation and trust and the inner-workings and inter-workings of the some 35 or 40 separate entities involved and the investigation of the attitude of the government people involved together with the planning and presentation of defenses to the Government's tax claims all were so complicated as to make it impossible to estimate even within the neighborhood of what his services would be reasonably worth until a later date.

The Commissioner ruled on July 3, 1957, to waive income tax claims against the trust, and by October, 1957, had waived examination or approved the tax reports of the other Selected entities and subsidiaries, for 1956 and prior years but indicated the trust would be taxed for 1957 and thereafter on its income although it might have paid such income to its investors. (Mr. Carroll considered revising the trust and the investigations and involuntary bankruptcy proceedings ensued). It is here noted that the "finding" of the purported letter-agreement of October 29, 1954, occurred some eight or more months after the rendition of the above ruling (and some three or four months after the public announcement of its terms).

Mr. O'Bryan, Sr., practiced law in his own name alone prior to admission of his older son to the practice and to the firm. On March 24, 1953, such son was admitted. The younger son was admitted to the practice of law and to the firm on July 19, 1955. Mr. O'Bryan stated that such younger son had worked in Mr. O'Bryan's office since that son was in high school, part of the time, at least, as a senior law clerk.

In the Federal Court hearing the respondent testified that nobody had ever said that the younger son was a mem-

ber of the firm (prior to his admission to practice); that, if he remembered correctly, later on Don (the younger son) was a senior law student; that they thought he was going to finish up some classes and in five or six months would be admitted; that respondent naturally wanted his sons' names on there with his and put Don's name there; that after Don was admitted to practice law, his name was added to the firm name and it became "O'Bryan, O'Bryan and O'Bryan"; that if in this interim they had any stationery, whatever it was, they used it up; that he had endeavored to find out and as he understood, Donald's name was put on this letterhead in 1954, in January.

He said this was in anticipation of Don's graduation. In other testimony he said Don had a mixup on class schedules because of being employed and did not graduate until 1955.

Respondent testified further that he ordered some "O'Bryan and O'Bryan" stationery after his older son Howard's admission, and he assumed still other "O'Bryan and O'Bryan" stationery when they ran out with Donald's name on it; that he recognized "O'Bryan and O'Bryan" stationery shown him by counsel with letters apparently written thereon respectively on October 29, 1954, and November 3, 1954, and that Donald's name did not appear on either of such two latter letterheads. He further stated he bought all his stationery through Mike Bryan.

Respondent said he did not know but could learn from a lady employee of Mike Bryan when the changes were made. A joint-owner of the firm which did the engraving work for Mike Bryan Office Supplies testified from his records that his firm engraved the first die for O'Bryan and O'Bryan on January 25, 1954, changed the die on September 15, 1955 and on October 5, 1956, engraved the die for O'Bryan, O'Bryan and O'Bryan.

In the Bar trial before Mr. Rheam, Mrs. Stephens, part owner of the stationery house which was said to have supplied respondent with all his stationery, testified of effect she had been friends with Mr. O'Bryan for several years, was in his office every Monday for 2 or 3 years to get orders, would order out small orders and bill him, but had to get his approval on large orders; that from the dates and amounts of invoices, appearance of stationery samples, etc., it would appear the "O'Bryan and O'Bryan" stationery with the names of the three O'Bryans in upper left-hand corner was ordered in September, 1955; that the purchase orders had long since been destroyed and without those she could not say positively.

She said the W. H. Pat O'Bryan letter of October 29, 1954, addressed to Mr. Hugh A. Carroll, to which reference has been made repeatedly herein, was exactly the same paper as the sample of O'Bryan and O'Bryan letterhead with the names of the three O'Bryans in the upper left-hand corner which she had testified previously was engraved pursuant to the "work order dated September 7, 1955," Western Bond, twenty-pound, and added "It has exactly the same copy here, and it has exactly the same copy here and here as it does on here." She testified the two exhibits were the same type of paper and that she had no record any place she could find that a first run of paper comparable to the September 7, 1955, run sample, had ever been produced before that time. Similarly, Mrs. Stephens testified that to her knowledge the O'Bryan, O'Bryan and O'Bryan stationery was not reproduced before the date indicated, September 25, 1956. She stated, "No sir, there is no doubt about that, so far as I can see, I'm sure that this must be it, because there would be no new die required to produce this job unless the old die was lost and it wasn't lost."

A motion seeking a new trial on the grounds of newly discovered evidence was filed. Attached thereto were two

affidavits, one made by the witness, Mrs. Louise Stephens. In her such affidavit Mrs. Stephens stated that she had read a statement in the Findings of Fact and Conclusions of Law in this matter to effect that she had testified "that the particular stationery of O'Bryan and O'Bryan upon which the purported letter contract was written, was not in existence until September 15, 1955."

She avers "I positively did not make that statement."

Counsel makes further point that, in that affidavit seeking to bolster request for new trial, Mrs. Stephens states that she could not know positively when certain stationery orders were made up without the purchase orders, which had been destroyed; that 20 or 25 people handle the copy inside the job tickets (envelope); that it is fairly simple to get the contents of the envelopes mixed up, it often happens; that she didn't check the records the F.B.I. borrowed before they took them; that the paper on which the letter-contract herein involved was typed was a brand of paper sold by 31 major houses scattered over the west and midwest; that when she had testified that she found no record that the O'Bryan and O'Bryan letterhead with the three names at upper left-hand side had ever been produced until September, 1955, she meant, only, that there was no record; that any record they might have had had long since been destroyed; that from examination of the letterheads and transparencies thereof she now says there are two different dies someplace on O'Bryan and O'Bryan; that that means that they could have at some earlier date than September 15, 1955, made another die and lost their records, or some other engraver could have done so; that $7.50 is far too much for merely adding a name since only $15.20 was charged for a completely new die; that, having seen the two transparencies, she now knows there is another die and another order of letterheads with O'Bryan and O'Bryan at the top; that they could have produced the

letterheads and lost the record or that they could have been ordered from out of town, because the price was less than those produced here; that she recalled Howard O'Bryan ordered some stationery from out of town and apologized for it.

Mr. Caporal, an attorney, testified he visited the O'Bryan offices before Donald had passed the Bar examination; saw a new letterhead Howard showed him; noticed it had O'Bryan and O'Bryan at the top and Donald's name with respondent's and Howard's at upper left as did the letterhead on which the October 29, 1954, letter was typed.

In the hearing before the trial examiner it was stipulated that Mr. O'Bryan was employed by Selected Investments; that it was not contended that $1,000,000.00 would not be a reasonable fee for his services. Mr. Washington testified respondent performed services. A vice-president and an auditor of Selected had been told by respondent in June, 1956, and the summer or fall of 1955, respectively, that he had to win the case to get paid a fee.

Mr. Carroll testified that he hired Mr. O'Bryan early in 1953; that respondent told him it would take some time to become acquainted with the organizational structure of Selected and determine what a reasonable fee would be; that in October, 1954, respondent submitted a brief and they then agreed orally to "a fee of ten percent of the savings that might be attained; that that was subsequently reduced to writing; that the purported letter-agreement of October 29, 1954, was the agreement they signed; that it was signed on its date or it could have been early in 1955 or somewhere in there; that the Government had allowed all their deductions which they had taken in the years gone by but beginning January 1, 1957, all the earnings of the trust fund would be taxed as an association at regular corporate rates 52 per cent; that an audit had been started; that he was pleased with Mr. O'Bryan's services; that under Securities Exchange Commission rules he would

have had to have an auditor who was a C. P. A.; that he wanted one who was an attorney; that after getting a copy of the ruling of the Commissioner of Internal Revenue at the time, sometime similar to this letter" (the conference memorandum of November 4, 1957, wherein Mr. O'Bryan suggested a fee of 5% of $5,000,000.00 and continuous long-time employment) he talked with Mr. O'Bryan trying to settle the fee; that the state receivership case occurred before they got the fee matters settled.

Mr. Carroll stated that he didn't know whether any other Selected officers knew of the purported October 29, 1954, agreement; that quite frequently he would enter into agreements involving many hundreds of thousands of dollars by simply signing a memorandum agreement not attested by the Secretary of the Corporation and without submitting same to his Board of Directors; that he did the same with Capitol Gate; that he knew very substantial sums would be involved in the O'Bryan agreement, particularly if the Government went after income taxes from the beginning of his company; that his attorneys raised no questions because his wife and he "owned 86% of it;" that Mr. Carroll and Mr. O'Bryan had a conference at which Mr. Carroll called Mr. O'Bryan's attention to there being no reference to a written contract in the November 4, 1957, memorandum (proposing 5% fee of $5,000,000.00) and "that we did have that written agreement calling for the ten per cent. He said, 'well yes, I know that but what I am trying to do now, is to work out a basis whereby we can have a lesser fee and then have a continuous income over a good many years after the new set-up is brought about.'"

Mr. Rader testified Mr. O'Bryan, who had done his income tax returns since 1933, told him 4 or 5 years previous to March, 1959, that he had a contract with Selected Investments for a contingent fee of 10% of whatever he saved the corporation, "up to a million (dollars) maybe."

Mr. Myers, an Oklahoma City attorney, testified Howard O'Bryan, Jr., in late 1954 or early 1955, told him his father had a contingent fee contract with Selected that would run into hundreds of thousands of dollars; that he had a contract and couldn't fail to get his fee.

Mr. Lewis, an attorney, testified by deposition quite at length of general effect that he lived in New Mexico but had lived and practiced law in Oklahoma and had known Mr. O'Bryan 15 or 20 years; that his reputation was good; that he was the best qualified tax lawyer he knew anywhere; that respondent had told him two or four years before February, 1959, that he had saved a client not named $4,000,000.00 and that the witness advised respondent a reasonable attorney fee would be 10% of such saving.

Mr. Howard O'Bryan, Jr., testified that he believed the type of letterhead upon which the purported letter-contract of October 29, 1954, was typewritten was in existence prior to Donald's being admitted to practice law; that he definitely recalled seeing some of that stationery in the spring of 1955 when Caporal came to the office; that Mr. Caporal and he joked about Donald not then being a member of the Bar; that he did not recall that testimony at the time of the Federal Court hearing; . . . that witness observed the exhibit; it was the contract that was made; . . . that the stationery he saw on the named occasion could have had O'Bryan, O'Bryan and O'Bryan at the top; that "Donald's name was listed there on the side;" that he felt he just didn't know whether this particular stationery, Complainant's C-23, was in existence in October of 1954, or not; that there was a great deal of excitement around the office when they won the Federal tax case "because of the fact and anticipation of receiving a very large fee;" that he was sure he had seen complainant's C-23 "and to just actually state a date that I saw it, I just can't say. I just know that it was there and I believe I

know that I must have seen it, but I cannot give you an exact date that I did see it;" that he had discussed it with Mr. William S. Myers and with Mr. Thomas Bamberger; that he remembered a discussion with his father of the fact that they were hopeful to win the case, and when they won it they would have this ten percent (10%) coming; that witness did not "recall ever of discussing that letter . . ."

Such witness testified he signed three letters which were previously admitted as exhibits being letters to an Oklahoma City attorney dated June 8, 1955, August 31, 1955, and September 2, 1955, respectively, and typewritten on stationery bearing the heading of O'Bryan and O'Bryan, and having only the names of W. H. Pat O'Bryan and Howard O'Bryan, Jr., in the upper lefthand corner.

Mr. O'Bryan, the respondent, testified before the trial examiner that the F.B.I. was given the run of his files; that he permitted the attorney for the trustee in bankruptcy the free run of his office "any time they wanted to;" that he gave them specimens of writing of all his typewriters "from 1952 and 1953 on up to date; that he didn't know how possession of his proposed conference memorandum of November 4, 1957, was obtained; that it could have been in the Selected Investment files, but that to the best of his recollection it ought to have been in his files; that his purported 10% contract was in his administrative file but that it had "been kinda misplaced;" that the occasion for finding it was that he knew he had an agreement and knew he had to search for it "and just ran across it;" that it was mis-filed; that immediately thereafter he filed his amended claim; that he made three or four computations and filed the claim for the maximum amount; that the Special Master in the bankruptcy case told him to "just set it up like you would in a damage suit;" that he did not suppose he had ever filed a damage suit in his life; that he did not remember ever filing a claim in bankruptcy; that he did not even remember ever "making

a motion docket;" that he confined his work to his tax specialty; that his work was "confined almost entirely to civil matters or to our office work, appearance before governmental bodies and things of that kind;" . . . that he won the Federal tax case the hard way and was entitled to a fee of at least $500,000.00; that he had saved Selected from $7,000,000.00 to $11,000,000.00; that he was sure that the stationery such as that upon which the October 29, 1954, purported contract was typewritten was in use in the office in 1955; that the November 4, 1957, conference memorandum was a blown up piece of paper which he was going to deliver to Mr. Carroll for the purpose of letting him talk to the auditors; that if he had come out at that time with, "you owe us a million dollars" he would have "scared everybody off and there would really have been trouble; that the entire purpose of this thing as such was to let Mr. Carroll have to send around his stockholders."

Mr. O'Bryan testified that he did not perfect an appeal from denial of his claim in Federal Court and that he had repaid Selected the $5,000.00 that he had received after January 1, 1958, with which he was surcharged by such Court. He stated that after deducting the amount of advances he had received, he estimated he was "in the hole approximately ninety six thousand dollars ($96,000.00), plus five years work."

Mr. O'Bryan made a statement indicating a belief on his part that the trial judge in Federal Court was prejudiced against him and that he was told before decision was rendered in that court that he didn't have a chance. He further said he "was informed that they wanted five thousand dollars ($5000.00) of the ten thousand dollars ($10,000.00) that was paid to me on the State case on the theory that that was paid in contemplation of bankruptcy. Well, I didn't like that very well and what the alternative was, the alternative was that if I did not accept this proposition,

Judge Chandler was going to hand down a judgment for ($59,000.00) fifty-nine thousand dollars against me and my two sons. It was also told to me by my attorney that the Judge was going to see to it that disbarment proceedings were instituted against me and my two sons; and further, for the matter to be referred to the District Attorney's office for criminal charges to be brought against me and my two sons."

Respondent stated he got the $5,000.00 and refunded same and that he abandoned an appeal because of financial stress.

Respondent further said, "I haven't done one cotton-picking thing that's wrong and that's the way I'm willing to let my case rest."

In Oklahoma, an attorney, upon his admission to the Bar, takes an oath that he will act in the office of attorney in this court according to his best learning and discretion with all good fidelity as well to the court as to his client. 5 O. S. 1961 § 2. State ex Rel v. Ferguson, Oklahoma, 356 P. 2d 734.

This Court has exclusive power to prescribe rules for conduct of and to discipline attorneys and to revoke permits to practice law. 5 O. S. 1961 § 13. State ex Rel v. Ferguson, supra.

This Court by rule has adopted the code of ethics of the American Bar Association as the standard of professional conduct of attorneys at law and further by rule has ordered that "all members of the Association shall be governed thereby;" and that "An attorney violating any of such canons shall be subject to discipline or disbarment, . . ." Article 10 of The Revised Rules Creating, Controlling and Regulating the Oklahoma Bar Association, 6 O.S. 1961, Chap. 1, App. 1, State ex Rel. v. Ferguson, supra.

Canon 22 of such Canons of Professional Ethics states, in pertinent part, that, "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness . . ." and that "It is unprofessional and dishonorable to deal other than candidly with the facts . . . in drawing affidavits and other documents, and in the presentation of causes . . ."

Canon 29 thereof, in pertinent part, states that "The lawyer . . . should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

Respondent, in effort to dissuade this Court from following the recommendation that he be disbarred, asserts two propositions of error. The first is that the findings of fact and conclusions of law are not supported by the evidence.

It is argued that a "false claim" is one for more compensation than that to which the claimant is entitled, or a statement or claim which is not true, but that a mere mistake, made through error or inadvertence, is not within the intendment of the expression; that an attorney is presumed to be innocent of a charge upon which his disbarment is sought, and to have performed his duty as an officer of the Court in accordance with his oath; that the Court, to be warranted in adjudging disbarment, must be satisfied from the evidence to a reasonable certainty that the charges are true; that his guilt must be clearly proven and that more than a preponderance of the evidence is required. (Authorities are cited for these statements.)

Respondent argues that he had earned a fee of half a million to a million dollars; that there was but a scintilla, at most, of evidence tending to show that the letterhead in question was not in existence prior to 1955. He discusses the effect of the testimony. He contends that he had no full opportunity, with preparation, to cross-examine Mr.

Nichols in the Federal Court hearings and adds, ". . . nor was he prepared to call witnesses to refute the inferences made by Harry E. Nichols, Jr." Respondent makes point of the fact that he never did testify that the purported letter-contract was executed exactly on its date; that the Federal Judge indicated, according to portion of the record quoted, that it was his idea "that this contract wasn't written when it is purported to have been written. . . . Now, if that is true, that is all there is to this lawsuit, if he can prove it. The fraud would vitiate the whole transaction." Respondent says such is not the law (citing authority).

Thereupon counsel launches into a forty-page discussion of the evidence in the case. He argues that the November 4, 1957, memorandum was an instrument gotten up by Mr. O'Bryan for Mr. Carroll to use in dealing with auditors and stockholders in the impending reorganization of Selected, but never delivered to Mr. Carroll; that Mr. Carroll and Mr. O'Bryan both knew Mr. O'Bryan had a written contract for a 10% fee but that the idea was that Mr. O'Bryan would collect only $250,000.00 or so at the time, would have to pay income taxes only upon that amount at that time, and would receive a sort of retainer for some 10 years and pay income taxes thereon in a much lower bracket, and that Mr. Carroll's companies would have the use of the difference in amounts of money for several years and could use it to make more money. A summary of the evidence of other witnesses was given and counsel concluded that "it is impossible to see how the prosecution has sustained the burden of proving respondent's guilt by 'more than a preponderance of the evidence' when he, at all times, is presumed to be innocent."

Our statutes, under the subject of Contracts, 15 O. S. 1961, §§ 57, 58 and 60, deal with the subject of fraud. Section 57 states that "Fraud is either actual or construc-

tive," Section 58 defines actual fraud, and Section 60 provides that "Actual fraud is always a question of fact."

In this case it appears that respondent in November, 1957, thought he had an oral contract. He still thought so in early March, 1958, and on the 24th day of that month. But by May 21, 1958, he had a purported written one. The original and amended sworn claims filed in the bankruptcy case appear to be contradictory of each other. Explanation thereof sought to be made seems insubstantial.

The evidence appears to show that the letterhead upon which the October 29, 1954, purported letter-contract attached to amended claim as exhibit was not in existence at least until 1955, probably in September.

In the case of McAtee v. Garrod, 185 Okl. 314, 91 P. 2d 1095, 1098, this Court said:

> "It has also been held that the gist of fraudulent misrepresentation is the producing of a false impression, and the means of accomplishing it are immaterial. Wilson v. Rentie, 124 Okl. 37, 254 P. 64. Also see Operators Royalty & Producing Co. v. Greene, 173 Okl. 388, 49 P. 2d 499."

In 37 C. J. S., Fraud § 61c, 350 it is stated:

> "It is not essential to liability that the person charged with fraud should have received any benefit therefrom . . ."

In 23 Am. Jur., Fraud and Deceit § 26, 779, it is said:

> "Fraud will vitiate any contract procured thereby . . ."

In Griffith v. Scott, 128 Okl. 125, 261 P. 371, 376, citing R. C. L., this Court said:

> "'Fraud may be proved by circumstantial evidence. Indeed, from its nature it is difficult to prove it by direct evidence, and it is seldom that it can be so

proved. Hence it is more often shown by circumstances than in any other way. It is impossible, however, to enumerate the facts from which it may be inferred. Each case must depend on its own facts, and all the facts and circumstances connected with and surrounding the transaction are to be considered together in determing whether it was fraudulent. Facts of trifling importance when considered separately, or slight circumstances trival and inconclusive in themselves, may afford clear evidence of fraud when considered in connection with each other. It has been said that in most cases fraud can be made out only by a concatenation of circumstances, many of which in themselves amount to very little, but in connection with others make a strong case.'

"Many cases, both state and federal, are cited in support of the different phases of the text."

In 24 Am. Jur., Fraud and Deceit, § 281, 127, it is said:

". . . the general rule is that it is not essential to the sufficiency of circumstantial evidence as proof of fraud that the facts be such that they are not explicable on any other reasonable hypothesis than that of fraud. Circumstantial evidence of fraud need not be conclusive or so strong as to dispel any and every doubt as to the existence of fraud, even though the fraud alleged constitutes a criminal offense, but is sufficient if it satisfies the mind and conscience that a fraud has been committed as alleged or if it fairly tends to prove fraud and produces a clear and rational belief of its existence."

In the case of Wingate et al v. Render, 53 Okl. 656, 160 P. 614, 617, this Court stated,

". . . the evidence tending to show fraud on the part of the plaintiffs in padding the books of the com-

pany and the statement of their assets made for the information of the defendant is very voluminous and covers a wide range."

"A wide latitude is allowed in causes of fraud, and circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidence, be sufficient to constitute conclusive proof."

As asked by counsel for complainant in brief, "May an attorney working under an oral agreement of employment reduce said agreement to writing in order to strengthen his claim for fees and submit the same to the Court as though it had been in existence prior to the dispute or controversy in connection with the attorney fees?" We believe that is what occurred here, but that same may not properly be done.

We conclude that the evidence in this case is sufficient to overcome the presumption that respondent is innocent and to establish to a reasonable certainty that the charge against him is true.

In his second proposition it is contended on behalf of respondent that he "has been denied due process of law and equal protection of the law as guaranteed by Art. 1, Sec. 1; Art. 2, Sec. 2; Art. 2, Sec. 7, of the Constitution of the State of Oklahoma and the 14th Amendment to the Constitution of the United States."

By the respective sections of the Constitution of Oklahoma to which reference has been made by counsel, it is provided that "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the Supreme law of the land;" that "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own

industry;" and that "No person shall be deprived of life, liberty, or property, without due process of Law."

By the Fourteenth Amendment to the Constitution of the United States it is provided, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person without the jurisdiction the equal protection of the law."

In sub-paragraph (a) of respondent's second proposition, he asserts that "The Supreme Court exceeded its authority in delegating the judicial powers to the Oklahoma Bar Association." He argues that this Court, in creating the Bar Association by order, has said it has inherent power so to do; and that such "power is not subject to delegation to committees and representatives." (Citing In Re Integration of State Bar of Oklahoma, infra). He defines a private corporation as being one which does not possess governmental powers or functions and states that by its revised rules this Court has made the Bar Association a private corporation and sought to bestow upon it a measure of its own inherent power to disbar.

Respondent quotes from In Re Integration of State Bar of Oklahoma, infra, wherein is set forth the procedure for filing a complaint and getting a hearing thereon, and "urges that the present Bar rules are unconstitutional in that the Supreme Court has attempted to delegate to the O. B. A. its non-delegable authority—hence, this entire proceeding is a nullity."

In such case of In Re Integration of the State Bar of Oklahoma, 185 Okl. 505, 95 P. 2d 113, 115, this Court quoted from the case of In re Integration of Nebraska State Bar Association, 133 Neb. 283, 275 N. W. 265, 267, 114 A.L.R. 151, as follows:

> " 'The inherent power of this court which petitioners ask us to invoke has always existed. This power is

not subject to delegation to committees and representatives, although these agencies may be utilized for investigation or fact-finding purposes and to make recommendations, but the final decision must rest with the court.'"

In the present case, this Court has merely been afforded the services of certain members and officials of the Oklahoma Bar Association in presenting respondent's case to the trial examiner and in turn to the Court. The ultimate responsibility rests with the Court. We find no merit in respondent's argument that the Court has exceeded its authority in the respects asserted for the reason none of its judicial powers have been delegated to the Bar Association. This Court itself has the final say in matters of the present sort.

As his sub-proposition (b) of such second proposition, respondent asserts that

> "The Bar rules did not afford the respondent due process of law in that the respondent was indicted by the Central Committee of the Oklahoma Bar Association, tried with a member of the Central Committee appearing as Judge, with the aforesaid trial examiner appearing as an advocate for conviction before the Executive Council thereby causing the Executive Council to 'rubber stamp' the trial examiner's Finding of Facts and Conclusions of Law; said Executive Council having met secretly, tried this respondent in absentia, and denied this respondent a hearing upon application for said hearing."

Respondent quotes portions of the rules concerning disciplinary proceedings (Art. VII (a) and (b)) including the following:

> "(a) The Executive Council may investigate misconduct by members of the Bar of this State . . ."

"(b) The Central Committee shall have the same authority as the Executive Council in disciplinary matters and wherever herein action by the Executive Council is specified, the action may be by the Central Committee."

Respondent cites authority for the point that "the deprivation of any rights, civil or political, previously enjoyed, may be punishment . . ."

He argues of effect that Mr. Rheam and one other member of the Central Committee could have constituted a majority of a quorum of three; that any two of that Committee could decide "to prosecute any member of the Bar, appoint one of the proponents for indictment as the Trial Examiner, rehash the case again at some secret meeting (which is supposed to be a hearing before the Executive Council), make no minutes or transcript concerning the indictment nor the hearing before the Executive Council, and file the same of public record in the Supreme Court."

Objection is made that no formal complaint was filed; that the "indictment" could have been returned by as few as two Central Committee Members, including Mr. Rheam who "tried him" and "actually indicted him"; that Mr. Rheam appeared before the Executive Council (which could have operated with as many as fifteen or as few as three persons present); that such Executive Council denied respondent's request for oral argument and adopted Mr. Rheam's findings and conclusions. The inference is that such Council then reported its action to the newspapers but gave respondent no copy of Mr. Rheam's report. Respondent emphasizes that he brought an original action in this Court seeking a writ requiring the Executive Council to grant him oral argument, and which we denied. Respondent quotes a rule of effect that respondent or his attorney were entitled to be furnished a copy of the report.

With respect to this line of objections and argument it is to be remembered that upon direction by the Executive Council, a complaint was filed by the then President of the Bar Association; that pursuant to authority granted it by the rules, the Executive Council selected Mr. Rheam as Trial Examiner and Mr. Smith as the Association's counsel; that respondent requested and was granted a public hearing; that his request for oral argument was, as reported by the Bar, considered before denial; and, that it is this Court which passes finally upon the record which respondent helped make.

Nothing in the rules required that respondent be granted oral argument in the earlier stages of the proceedings. He requested and was granted oral argument in this Court. From the news article quoted by counsel in brief it would appear that several of the statements therein apparently contained were attributed to respondent, but that it was therein stated that the trial examiner's report had not been filed, and that no official of the Bar would comment.

The Bar reported to this Court that before consideration of the report of Mr. Rheam on August 13, 1959, by the Central Committee and on October 15, 1959, by the Executive Committee, copy of the report, findings and recommendation was furnished to respondent. Under our criminal procedure a formal indictment must be returned by a grand jury (22 O.S. 1961 § 381.) However, a formal information may be filed by one county attorney (22 O.S. 1961 § 409) and a defendant in a criminal (even a capital) case may be held for trial upon the order of one magistrate. (22 O.S. 1961 § 264).

Counsel compares the proceedings herein to those in a military tribunal and decries that no investigation was made preliminary to institution of the proceeding. Apparently the Bar made an investigation sufficient for its

purposes inasmuch as it caused complaint to be filed. Even if respondent had no notice that he was being investigated, he did have notice of setting for trial, was present in person and by counsel and fully participated. That the trial examiner was required to take no oath is emphasized. An attorney upon admission to practice is sworn as an officer of the Court. Mr. Rheam presumably took that oath. And his service in this case was as an officer of the Court.

Counsel says lawyers are entitled to the benefits of the Fifth Amendment to the Constitution of the United States and quotes from an opinion of this Court in Cook v. Parkinson, 191 Okl. 529, 131 P. 2d 82, of effect that failure to observe "the forms of law" may amount to a "want of due process of law." Ex Parte Autrey, 58 Okl. Cr. 88, 50 P. 2d 239, is cited for the statement that Article 2, Section 7, Oklahoma Constitution, guarantees due process of law, the intendment of which is "to protect the citizen against arbitrary action, and to secure to all persons equal and impartial justice." Our attention is directed to the fact that the trial examiner upon occasion questioned respondent at length.

Counsel cites Ex parte A. H. Garland, 18 L. Ed. 370, of effect that the right of an attorney to practice law is one of which he may be deprived only by judgment of the court and that for moral or professional delinquency, Konigsberg v. State Bar of California, 77 Sup. Ct. 722, 353 U.S. 252 and Schware v. Board of Bar Examiners of the State of New Mexico, 77 Sup. Ct. 752, 333 U. S. 232, are cited for the principal that an attorney, or a prospective attorney, has a property right in the practice of law and that a state may not exclude a practitioner in a manner violative of due process or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. It is urged that the rules to which reference is herein made do not comply with the requirements of due process and

equal protection as guaranteed by the National and State Constitutions.

In the 1882 decision of the Supreme Court of the United States in Ex parte Wall, 107 U. S. 265, 273, 279, 288, 289, 290, 27 L. Ed. 552, 2 S. Ct. 369, the Court said, "It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll . . ."

* * * *

(Quoting from In Re Blake, 3 El. & El. 34) ". . . the court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers."

* * * *

"It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution, which forbids the depriving of any person of life, liberty, or property without due process of law. But the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offense is indictable is established by an overwhelming weight

of authority. This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus. . . ."

* * * *

"The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson v. New Orleans, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: 'It is not Possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.'"

No irregularity violative of any of respondent's rights has been discovered by us to have occurred in the handling of the preliminary stages of repondent's case.

Respondent for subhead (c) of his 2nd proposition of error states, "(c) This respondent was not confronted by the witnesses against him; hearsay evidence was introduced over the objection of respondent; hence, respondent was denied the right of cross-examination."

Objection is made that this proceeding was started by the sending of the Federal Judge's letter to the Bar Association; that such Judge's statements did not come to respondent's attention until the filing in this Court of the trial examiner's report; that discussions between such Judge and Counsel for the trustee in bankruptcy which

occurred in the trial on respondent's claim in Federal Court were included in the transcript of proceedings in that Court which was introduced in the proceedings before the trial examiner; that neither such Judge nor attorney testified in the Bar proceeding and respondent was denied an opportunity of cross-examining them.

The respondent continues that such trustee's attorney contended Mr. O'Bryan wrote the purported October 29, 1954, letter-contract after March 10, 1958, but that "There is not one iota of evidence in any of the proceedings which substantiates such an assertion." Point is made that that attorney was subpoenaed to testify on behalf of the Bar Association; that respondent had taken his deposition, in which he admitted that he had "pretried" the O'Bryan case with the Judge prior to the Federal Court hearing of November 3, 1958; "yet, the prosecution chose not to use his testimony;" that "It is readily apparent that the prosecution would have used Mr. Loving's testimony had it been to their advantage;" that "the parties, plaintiff and defendant, were not the same" in the Federal Court proceeding as in the Bar proceeding; and "hence, testimony of witnesses in that proceeding should not have been received in this proceeding;" that, "the assertion of the counsel as well as the vituperation of the Judge should not be included herein, especially as there was no chance of cross-examination nor were the statements under oath;" that, interestingly, in the order of the Federal Court denying respondent's claim for fee and directing that he return to the Trustee in Bankruptcy $5,000.00 of the money already received by him, there was "no finding that the respondent committed fraud;" that that Journal Entry of Judgment did not bar "respondent from practice in that Court; . . . hence, there appears to be no binding judgment on either of these issues."

Respondent sums up with the statement that he "has never been charged, in any court of general Jurisdiction,

with fraud or other misconduct" (except as inferrable from the Bar proceedings and newspaper accounts); that "he has never been presented with a Bill of Particulars or afforded the opportunity to answer and meet such charges or to be confronted with witnesses asserting the same; all of which constitutes denial of due process of law and equal protection of the law as guaranteed by Art. 1, Sec. 1 and Art. 2, Secs. 2 and 7 of the Constitution of the State of Oklahoma and the Fourteenth Amendment to the Constitution of the United States."

In the determination of the merits of this case, this Court has considered only the evidence introduced, the inferences properly deducible therefrom and the law we deem to be applicable to the facts.

In Ex parte Wall, supra, at pages 281, 286 and 287 of the U. S. Report, the Court stated:

> "The cases are quite numerous in which attorneys, for malpractice or other misconduct in their official character, and for other acts which showed them to be unfit persons to practice as attorneys, have been struck from the roll upon a summary proceeding without any previous conviction of a criminal charge."
>
> * * * *
>
> "In Matter of George W. Wool, 36 Mich. 299, a bill in equity having been filed against an attorney charging him with procuring a deed to himself by forgery or substitution of a paper, and a decree having been made against him, the court entered an order to show cause why he should not be struck from the roll, allowing him to present affidavits in exculpation; but no sufficient cause being shown against the rule, it was made absolute. Here was an indictable offense, and no previous conviction; yet the court, upon the evidence it had before it, struck the party's name from the roll."

* * * *

". . . Cases may occur in which such a requirement (conviction before striking name from rolls) would result in allowing persons to practice as attorneys, who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail by the abesnce of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; . . . But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be . . . It seems to us that the circumstances of the case, and not any iron rule on the subject, must determine whether, and when, it is proper to dispense with a preliminary conviction."

* * * *

"The provisions of the Constitution, which declare that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, and that the trial of all crimes, except in cases of impeachment, shall be by jury, have no relation to the subject in hand. As held by the Supreme Court of Tennessee in Fields v. The State (and the same view is expressed in other cases), the constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases . . . The preceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them . . . The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision."

In the recent case of Travelers Fire Insurance Co., etc., et al. v. Wright, et al., Okl. 322 P. 2d 417, 418, this Court held in effect that, in the trial of a suit by plaintiff upon an insurance policy it would have been proper for the lower court to have received in evidence the testimony of witnesses previously introduced in the trial of a criminal charge against him for burning the buildings purportedly covered by the policy. Therein, the Court said:

> "2. Testimony given at a former trial is admissible, under the common law, in a subsequent trial if the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has; provided it is necessary to admit such former testimony in order to utilize the knowledge of the witness, and provided the objecting party does not call to the court's attention any peculiar facts or circumstances which would cause the admission of such testimony to be an injustice."

Our attention has been called to no ultimate material facts known to the Federal Judge or Attorney Loving, in the capacity of witnesses, which could not be elicited and were not elicited from other witnesses, except possibly their feeling concerning respondent. And that would not be material to our present consideration. Moreover, counsel in objections, motions, briefs, et cetera has amply covered that matter to the full advantage of respondent.

Further, the proposed witnesses are members of the Bar, amenable to its process. No showing has been made either that they were subpoenaed by respondent for cross-examination or that had they been, they would not have appeared.

We conclude that respondent was afforded due process and equal protection of the law.

For the last sub-division of his second proposition of error, respondent states he "was denied the right of jury trial."

Respondent refers us to Oklahoma Constitution, Article 2, Sections 19 and 20. Such section 19 provides that "The right of trial by jury shall be and remain inviolate, . . ." Such Section 20 of that Article lists certain rights of the accused in a criminal case.

Respondent mentions the motions etc. he has filed herein pointing toward his being granted a jury trial; states his professional career is of the value of at least $20.00 (in a suit for below which amount a litigant may have less entitlement, under said Section 19, to a jury trial); refers us to the case of Keeter v. State, 82 Okl. 89, 198 P. 866, wherein the Court said that "Courts have a duty to enforce strict observance of constitutional and statutory provisions designed to preserve inviolate, right to, and purity of jury trial;" and refers us to 20 O.S. 1961 § 9 and § 10 relative to the procedure in this Court in a proper case for selection of a jury. He states this Court has original jurisdiction to try Bar complaints and infers from the foregoing authorities that in trying the complaint against respondent the services of a jury should be employed.

In the case of Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671, 684, the Supreme Court of Alabama, after a study of the question in twenty-nine states, including Oklahoma, said:

> "Due consideration of the adjudged cases in the several states of the Union leads us to the conclusion—which is unescapable—that the Courts have the inherent power to suspend or to remove attorneys without trial by jury."

As shown in both the portion of Ex parte Wall quoted in discussion of sub-paragraph (b) and that quoted in dis-

cussion of sub-paragraph (c), respectively, of respondent's second proposition, the Supreme Court of the United States, for eighty years has been of the view that a lawyer is not entitled to a jury trial in a disbarment proceeding.

According to the Supreme Court of California in In Re Wharton, 114 Cal. 367, 46 P. 172, an accused lawyer in a disbarment proceeding under their statute was not entitled to a jury trial.

In Gould v. State of Florida, 99 Fla. 682, 127 So. 309, 69 A.L.R. 699, 701, the Supreme Court of the named State said that as applied to a disbarment proceeding, "a jury trial is not required."

In Oklahoma, the common law, as modified, remains in force in aid of statutory provisions and judicial decisions. 12 O.S. 1961, § 2. This Court has the inherent power to admit lawyers to the practice of their profession and to disbar those whose conduct warrants such action. In such an instance, the accused is not entitled to a jury trial.

In respondent's reply brief three propositions are advanced. It is first stated that complainant abandoned its cause of action in opening statement.

The second proposition in respondent's reply brief is that complainant's summary of the testimony is not supported by evidence. For his last such proposition respondent deals with an exception to the hearsay rule and quotes from Kurn et al v. Thompson, 187 Okl. 664, 105 P. 2d 422 of effect that where it is claimed the testimony of a witness is a recent fabrication, he may be corroborated by showing previous self-serving declarations conforming thereto, if made at a time when a motive to misrepresent did not exist.

We believe all these matters and the arguments submitted in connection therewith to have been fully answered in the foregoing portion of this opinion.

It is also urged in the reply brief that as of the date of filing thereof no criminal indictment had been lodged against respondent. A motion to Stay Ruling was filed herein on August 9, 1962, on behalf of respondent. In that motion respondent referred to the pendency in Federal Court of his motion to dismiss the indictment. Recently, upon invitation by order of this Court, respondent filed a response advising that he had been indicted by a Federal Grand Jury in November, 1961; that he had filed a motion to quash the indictment because a Federal Judge was present in the grand jury room and gave that body certain information concerning Mr. O'Bryan's case; that such motion had on September 28, 1962, been sustained. A copy of transcript of proceedings in the grand jury room was attached. Respondent alleges bias on the part of the Federal Judge and states that two other grand juries have convened and adjourned and neither has indicted respondent. On May 1, 1963, respondent filed an instrument entitled "Supplemental Information." That also dealt with the validity of the grand jury indictment.

In Mr. O'Bryan's affidavit attached to motion for new trial he stated that he had "permitted the F.B.I. to investigate and examine his records, his personnel, the actual document in question, the typewriter upon which the document in question was typed, stationery, typewriter specimens, and every thing of every nature that the F.B.I. considered relevant to its investigation;" that he had learned from a public statement of the Federal Judge that the F.B.I. found nothing wrong with the questioned document, and made no recommendation for the filing of a criminal charge; that if he were granted a new trial he would be able to subpoena witness who would "testify to the results of the F.B.I. investigation, which testimony would be likely, as affiant verily believes, to change the result of a new trial."

For a discussion of the principles involved in such a situation, see the second series of quotations from Ex parte Wall, supra.

In the 1921 Vermont case of Re O'Brien, — Vt. —, 113 Atl. 527, 14 A.L.R. 859, 866, the Supreme Court of that state dealt with the case of an attorney found to have falsely testified that 4 or 5 years before 1917 he found a paper prepared by an attorney who had died in 1904 and whose office he later occupied, which instrument, if genuine, would affect the outcome of a certain suit. The Court refused to vacate a prior judgment disbarring O'Brien. In that case, the Vermont Court said:

> ". . . But where disbarment may be ordered for criminal misconduct, without awaiting a conviction thereof, an acquittal will not, as of course, prevent the entry of an order to that end . . . Nor will the refusal of a grand jury to find an indictment for the same criminal misconduct charged in disbarment proceedings be a defense to the latter . . . And for the same reason the entry of a nolle prosequi in a criminal prosecution does not constitute a defense to disbarment proceedings based on the commission of the crime."

Several cases in which the facts bear some similarity to the facts in the case at bar have come to our attention.

In the 1891 case of People ex Rel Atty. Gen. v. Beattie, 137 Ill. 553, 27 N.E. 1096, the Supreme Court of Illinois disbarred a Chicago attorney who knowingly drew a false complaint for divorce, introduced false testimony as to plaintiff meeting residence requirements, etc., and prepared and delivered to his client a supposed decree of divorce upon the basis of which she remarried before a decree had in fact been entered. See also the 1958 case of In re King, 7 Utah 2nd 258, 322 P. 2d 1095. In the case of People ex Rel. Chi. Bar Ass'n., v. Martin, 288 Ill. 615, 124 N. E. 340,

14 A.L.R. 854, an attorney was disbarred for having knowingly made a false affidavit concerning his client's defense. See also In Re Taylor, 300 Ky. 448, 189 S. W. 403, where the court said an attorney was "guilty of deceit and assisting to perpetrate a fraud upon the court" by having sat by while his purported wife sought to prove and dissolve a marriage, which the lawyer later denied ever existed, etc., etc.

See also the case of In Re Wright, 69 Nev. 259, 248 P.2d 1080, 1083, wherein the court stated:

> "It is clear that subordination of perjury, tampering with witnesses or otherwise practicing deception upon a court by fraudulent devices is gross misconduct in the perverting or obstructing of justice and warrants disbarment."

It makes no difference that a false statement is to be used in another court, even in another state. See annotation in 14 A.L.R. at page 869.

For the foregoing reasons, it is determined that the recommendation of the Oklahoma Bar Association that respondent, William Howard (Pat) O'Bryan, be disbarred from the practice of law in Oklahoma and his name stricken from the roll of attorneys of this state be and the same is approved and he is hereby disbarred and his name ordered so stricken.

It is the further order of this Court that respondent may apply to the proper officials of the Bar to be reinstated as a member thereof at any time after two years have elapsed from the effective date of this opinion.

BLACKBIRD, CJ., HALLEY, VCJ., and JACKSON, IRWIN AND BERRY, JJ., Concur

JOHNSON, J., Dissents.

Appendix B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, EX REL OKLAHOMA BAR ASSOCIATION, Complainant,	)	
vs.	)	SC BD #1792
WILLIAM HOWARD (PAT) O'BRYAN, Respondent.	)	

REPORT, FINDINGS AND RECOMMENDATION OF THE EXECUTIVE COUNCIL AND THE CENTRAL COMMITTEE OF THE OKLAHOMA BAR ASSOCIATION

The Oklahoma Bar Association, pursuant to direction of the Central Committee in session duly convened on the 13th day of August, 1959, and at the direction of its Executive Council duly convened on October 15, 1959, herewith makes its Report, Findings and Recommendation in the above entitled matter and certifies the same to the Supreme Court of the State of Oklahoma, together with the Report of the Trial Examiner, by whom this matter was heard in accordance with the Rules Creating, Controlling and Regulating the Oklahoma Bar Association. There also accompanies this Report and Recommendation a full, complete and certified Transcript of all of the evidence produced before said Trial Examiner. Said Transcript contains a copy of the Complaint (Tr. 2) upon which the matter was tried and a copy of the Answer (Tr. 5) which was filed by Respondent. Said Transcript contains the Exhibits introduced in behalf of both parties hereto.

The Complainant states that this proceeding was begun on November 13, 1958 when the Executive Council considered a letter from Judge Stephen S. Chandler which advised the said Executive Council of conduct on the part of Respondent herein on account of which conduct the said Respondent's name was stricken from the roll of attorneys in the said Judge Chandler's Court and Respondent barred from practicing in said Court again. (Tr. 425). The Executive Council assumed original jurisdiction of this matter and authorized the filing of a Formal Complaint and designated Floyd L. Rheam, one of its members, to hear the matter for the Executive Council, and Mr. John Lee Smith, attorney of Oklahoma City, as prosecutor for the Bar Association.

A copy of the complaint above referred to was furnished Respondent by registered mail on December 29, 1958 and the case was set for trial on March 2, 1959. The case was originally set for hearing in Parlor 5 at the Huckins Hotel in Oklahoma City and upon Motion by Respondent to Make The Proceeding Public (Tr. 7) the hearing was had in a courtroom at the County Court House in Oklahoma City, The Respondent was present in person and by his attorney of record Mr. William D. Fore.

The Findings of Fact, Conclusions of Law and Recommendation of the Trial Examiner, copies of which are filed herewith, was presented to the Central Committee at its August 13, 1959 meeting, at which time the same was studied and reviewed and a discussion was held concerning the evidence which was produced in support of the Complaint herein. The Trial Examiner as shown by his Findings of Fact and Conclusions of Law concluded that the Respondent William Howard (Pat) O'Bryan was guilty of having filed a false and fraudulent claim for attorneys fees in the Federal Court of Judge Stephen S. Chandler and that such action on his part constituted unprofessional conduct, a breach of his oath as attorney at law and in

direct violation of Canons 22 and 29 of the Canons of Ethics of the Oklahoma Bar Association. Said Trial Examiner recommended that Respondent be disbarred from the practice of law in the State of Oklahoma.

A short time previous to the meeting of August 13, 1959 Respondent was furnished a copy of the Trial Examiner's Findings of Fact and Conclusions of Law. Thereafter, and previous to August 13, 1959, the said Respondent through his attorney filed a Motion For Oral Argument Before the Executive Council prior to their consideration and ruling on the Report of the Trial Examiner. His request was not granted and thereafter, on or about the first day of September, 1959, the said Respondent through his attorney of record, William D. Fore, filed in the Supreme Court of the State of Oklahoma, a Petiton For Writ of Prohibition Against John M. Holliman, President of the Oklahoma Bar Association, wherein Respondent prayed that the Supreme Court prohibit the said John M. Holliman from filing the Report and Recommendation of the Bar Association in the Supreme Court until the Executive Council had ruled upon the said Respondent's Motion For Oral Argument before the Executive Council. The Supreme Court on the 17th day of September, 1959 denied Respondent O'Bryan's Application to Assume Original Jurisdiction therein.

Thereafter, and on October 15, 1959, the Executive Council in session duly assembled again considered Respondent's Motion For Oral Argument. Upon motion duly made, seconded and passed the Executive Council after considering the Motion and having theretofore examined all of the evidence taken by the Trial Examiner on behalf of the Executive Council denied the Motion of Respondent and ratified the action previously taken by the Central Committee on August 13, 1959, approving the Report of the Trial Examiner and ordered the Report and Recommendation filed in the Supreme Court.

FINDINGS

The Central Committee being duly assembled on August 13, 1959 and the Executive Council being duly assembled on October 13, 1959 find that the Respondent William Howard (Pat) O'Bryan is guilty of unprofessional conduct, a breach of Respondent's oath as an attorney and that Respondent's actions complained of are in direct violation of Canons 22 and 29 of the Canons of Ethics adopted by the Supreme Court of the State of Oklahoma.

RECOMMENDATION

The Oklahoma Bar Association pursuant to direction of the Central Committee in session duly assembled on the 13th day of August, 1959 and at the direction of the Executive Council duly assembled on October 15, 1959 hereby formally recommend as follows: That the Respondent, William Howard (Pat) O'Bryan, because of his unprofessional conduct as set forth in the Complaint and proven by competent evidence and further because of his breach of his oath as an attorney, be disbarred from the practice of law in the State of Oklahoma, his license to practice law in the State of Oklahoma cancelled and his name stricken from the roll of membership in the Oklahoma Bar Association.

OKLAHOMA BAR ASSOCIATION

By .....
John M. Holliman, President

ATTEST:

.....
Kenneth Harris, Executive Secretary

Appendix C

BEFORE THE EXECUTIVE COUNCIL OF THE OKLAHOMA BAR ASSOCIATION

STATE OF OKLAHOMA EX REL,
OKLAHOMA BAR ASSOCIATION,
Complainant,

vs. SC BD #1792

WILLIAM HOWARD (PAT) O'BRYAN,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

The undersigned Trial Examiner to whom this action was referred to take and report the evidence and report the same together with findings of fact and conclusions of law thereon, respectfully reports to the Executive Council as follows:

The above entitled action came on before the Trial Examiner, and the Complainant State of Oklahoma, Ex Rel, Oklahoma Bar Association appeared by their counsel, Mr. John Lee Smith, and the Respondent, William Howard (Pat) O'Bryan appeared in person and by his counsel, Mr. William D. Fore, and testimony having been offered and briefs filed by both parties, and the Trial Examiner having been duly advised in the premises, now makes and finds:

FINDINGS OF FACT

1. That William Howard (Pat) O'Bryan is an attorney at law, duly licensed by the Supreme Court of Oklahoma to prictice law in the State of Oklahoma; that he is and has been durng the times hereinafter referred actively engaged in the practice of law at Oklahoma City, Oklahoma.

2. That the said Respondent did on the 24th day of March, 1958, file a Proof of Debt in the District Court for

the United States Western District of Oklahoma In The Matter of the Involuntary Bankruptcy of Selected Investments, Incorporation, a corporation, and Selected Investments Trust Fund, Linwood O. Neal, Trustee, Debtor, Bankrupt No. 10680, claiming that said bankrupt was justly and truly indebted to the claimant in the sum of of $1,194,027.02; that the debt was for professional legal services performed at the instance and request of the bankrupt according to the statement attached to said Proof of Debt as Exhibit A. Said Exhibit A was a 32 page letter, dated March 10, 1958, addressed to Paul C. Duncan, Receiver, in which the Respondent said that he had an oral contract to represent Selected Investments Corporation for a reasonable contingent fee. In neither the claim nor the Exhibit attached thereto did the Respondent say that he had a written contract.

3. On May 21, 1958, the Respondent filed an Amended Proof of Debt in which he claims that he had a written contract with the bankrupt, which contract was dated October 29, 1954; this contract was written on engraved letterhead and stationery of O'Bryan & O'Bryan which shows the following legend at the top of the letterhead

Law Offices of
O'BRYAN AND O'BRYAN
Hightower Building
OKLAHOMA CITY, OKLAHOMA

Central 2-6151
W. H. (PAT) O'BRYAN
W. HOWARD O'BRYAN, JR.
DONALD L. O'BRYAN

Mrs. Howard Stephens, a part owner of the Mike*bryan* Office Supply Company, and Harry E. Nichols, Jr. of the Fine Arts Engraving Company, both testified that the par-

ticular stationery of O'Bryan And O'Bryan upon which the purported letter contract was written, was not in existence until September 15, 1955. The letter contract is signed by W. H. Pat O'Bryan and Hugh A. Carroll; both O'Bryan and Carroll testified concerning the execution of this contract and their testimony is vague and indefinite as to the exact date that the contract was signed. However, both testified that it was shortly after the date of October 29, 1954, the date of said contract.

While said contract of October 29, 1954 is supposed to have been in existence at that time or shortly thereafter, the Respondent addressed a conference memorandum to Hugh A. Carroll, dated November 4, 1957; this conference memorandum is 10 pages, and the conference memorandum asks Mr. Carroll for a conference concerning the work he has done and to discuss the fee. All through this conference memorandum the Respondent talks about the oral contract for a reasonable contingent fee. He does not at any time refer to a written contract for a fee as provided for in the letter contract of October 29, 1954. Both the Respondent and his son, W. Howard O'Bryan, Jr. testified that it was common knowledge around the office that they had a written contract for a 10% fee. So, if this were a fact, then it is strange that, one, the original claim filed by the Respondent was based upon an oral contract, and two, that in the conference memorandum of November 4, 1957, to Hugh A. Carroll that there was no mention of a written contract.

4. The evidence shows that the Respondent's claim was denied by the Honorable Stephen Chandler, Judge of the Federal District Court for the Western District of Oklahoma; that he was surcharged to the extent of $5000.00 and that he was disbarred from the practice in the Federal Court. The Respondent paid the surcharge of $5000.00 and prosecuted no appeal from the order denying his claim, surcharging him the $5000.00, and disbarring him from practice in the Federal Court.

CONCLUSIONS OF LAW

From the foregoing facts the Trial Examiner concludes that the Respondent William Howard (Pat) O'Bryan filed a false and fraudulent claim for attorneys fees and that such action on his part is unprofessional conduct, is a breach of his oath as an attorney at law, and is in direct violation of Canons 22 and 29 of the Canons of Ethics of the Oklahoma Bar Association, and that said Respondent should be disbarred from the practice of law in the State of Oklahoma.

Respectfully submitted,

/s/ Floyd L. Rheam
Floyd L. Rheam, Trial Examiner

Appendix D

THE REVISED RULES CREATING, CONTROLLING AND REGULATING THE OKLAHOMA BAR ASSOCIATION

Adopted and Promulgated by the Supreme Court
October 6, 1958

ARTICLE I

In the public interest, and for the advancement of the administration of justice, there is hereby created an association of the members of the Bar of the State of Oklahoma, the name of which shall be OKLAHOMA BAR ASSOCIATION.

* * * *

ARTICLE IV

Section 1. EXECUTIVE COUNCIL: The governing body of the Association shall be an Executive Council of seventeen active members of this Association, selected as follows:

(a) Three members selected by the House of Delegates for a term of three years, one of whom shall be selected at each annual meeting of said body.

(b) Nine members appointed by the —Supreme Court, one for each Supreme Court Judicial District, for a term of three years; three of such members to be named by the Supreme Court each year.

(c) One member of the Board of Bar Examiners, selected by the Board for a term of two years.

(d) The president, and Vice-President of the Association, during their terms of office.

(e) The President-Elect of the Association.

(f) The immediate Past-President of the Association during the year following his term as president.

The members of the Executive Council at the time of adoption of these rules shall continue in office until their respective terms as provided by existing rules shall expire, and until their successors shall be selected. A quorum of the Executive Council shall consist of eight members. A majority of a quorum shall suffice to carry any action of the Council except that recommendations for any amendment to these rules must receive the vote of a majority of all members.

Section 2. CENTRAL COMMITTEE: To facilitate the work of the Association, there is created a Central Committee out of the membership of the Executive Council which shall have and exercise all the powers of the Executive Council when the Council is not in session. The Central Committee shall be composed of five members, three to be designated by the Supreme Court, the President of the Association, and one member designated by the three members elected by the House of Delegates. Three mmbers of the Central Committee shall constitute a quorum.

Section 3. OFFICERS OF THE EXECUTIVE COUNCIL AND CENTRAL COMMITTEE: The President and Executive Secretary of the Association shall be, respectively, Chairman and Recording Secretary of the Executive Council and of the Central Committee.

Section 4. MEETINGS OF EXECUTIVE COUNCIL: The Executive Council shall meet at the offices provided for it at Oklahoma City or at such other place as it may elect, twice each year and at such other times as it or the Central Committee shall determine. The Central Committee shall meet at the offices provided for it at Oklahoma City, once each month, except the months when the Executive Council is meeting, and at such time and place as fixed by the Central Committee. Special meetings of the Executive Council or of the Central Committee may be called at other times upon three days' notice by mail, either upon the call of the Chairman or upon the call of three members, the notices to be mailed by the Executive Secretary to each member.

* * * *

ARTICLE VII

DISCIPLINARY PROCEEDINGS

JURISDICTION: This Court declares that it possesses original and exclusive jurisdiction in all matters involving admission of persons to practice law, and to discipline, for cause, all such persons, and, in the exercise of that jurisdiction, adopts and promulgates the following rules which shall govern disciplinary proceedings.

PART ONE

1. EXECUTIVE COUNCIL AND CENTRAL COMMITTEE EMPOWERED:

(a) The Executive Council may investigate misconduct by members of the Bar of this State tending to im-

pede the administration of justice or to bring the legal profession into disrepute, and, in accordance with procedure prescribed herein, may hear and determine disciplinary proceedings, and make and report to this Court their findings of fact, conclusions, and recommendations, or administer a private reprimand.

(b) The Central Committee shall have the same authority as the Executive Council in disciplinary matters and wherever herein action by the Executive Council is specified, the action may be by the Central Committee.

2. RULES: The Executive Council may adopt further rules of procedure consistent herewith governing the investigation of charges and the hearing of complaints, and its members may call to their assistance in the discharge of their duties members of the Bar of the State. Failure to follow such rules shall not be grounds for objection to any recommendation by the Executive Council, unless the respondent is shown to have been substantially prejudiced thereby.

3. GRIEVANCE COMMITTEES AND EXAMINERS: The President of the Association, with the approval of the Executive Council, may appoint one or more Grievance Committees in each District Court Judicial District. Each committee shall consist of not fewer than three nor more than five active or senior members of the Association. The Executive Council may appoint one or more Examiners, who shall be active or senior members of the Association. The Executive Council also may designate members thereof to act as Examiners. At the direction of the Executive Council, Grievance Committee or Examiners shall:

(a) Conduct preliminary investigations in disciplinary matters, or complaints concerning professional misconduct, and report thereon to the Executive Council.

(b) Conduct hearings on formal complaints of professional misconduct, filed as hereafter provided, which may be referred to them by the Executive Council, and report thereon their findings of fact, conclusions of law and recommendations.

4. PRELIMINARY INVESTIGATION: Whenever information shall come to the Executive Council concerning alleged professional misconduct by lawyers of this State, whether through formal or informal charges or through information, oral or written, from any responsible source, it shall be the duty of the Executive Council to make a preliminary investigation thereof, either by a Grievance Committee, by an Examiner, or by an employee of the Association, to determine whether there exists probable cause to believe that such misconduct has occurred so as to justify the institution of formal proceedings. The investigation shall be conducted with reasonable dispatch and the report shall be made promptly upon its conclusion. The Executive Council or the Grievance Committee or Examiners, in the exercise of sound discretion, may afford the lawyer involved an opportunity to be heard in the course of the preliminary investigation.

5. CHARGES: PREFERMENT AND FORM: Unless the Supreme Court or the Executive Council directs the institution of formal proceedings without it, a written charge, filed with the Executive Secretary of the Association, shall be a prerequisite to such institution. Such charges may also be required as the basis for an investigation. Charges may be filed (a) by a private person, individually or through an attorney-at-law, (b) by the President or Secretary of a regularly organized County Bar Association of ths State, or (c) by a Grievance Committee.

All charges must be signed by the persons filing the same and must be verified, unless otherwise ordered by the Executive Council. Charges filed as the basis for an investi-

gation shall be presented promptly to the Executive Council by the Executive Secretary. The Executive Council, after consideration, may:

(a) Dismiss the charges, if, upon their face, no probable cause exists for investigation.

(b) Refer the charges for investigation, as provided in Sections 3 and 4 hereof, if, upon reading the charges and after hearing such other information as may be presented, there appears probable cause to believe that ground for disciplinary proceedings may be revealed by investigation.

(c) Direct that a formal written complaint be prepared and disciplinary proceedings be commenced, without preliminary investigation, if the charges and information clearly show probable cause therefor.

6 INITIATION OF FORMAL PROCEEDINGS: Formal procedings in matters involving professional misconduct by lawyers shall be brought:

(a) Upon order of the Supreme Court; or

(b) By direction of the Executive Council.

They shall be initiated by a formal complaint, prepared by the Executive Secretary, or by a member of the Executive Council or other attorney under the supervision of the Executive Council, and be based on the information furnished by the order of the Supreme Court, or by the charges filed in the matter or by the report of any investigation made therein, or by the order of the Executive Council directing its preparation. The formal complaint shall be styled: The State of Oklahoma, Ex Rel. Oklahoma Bar Association, Complainant vs. (name of accused), Respondent. It shall state that it is filed by order of the Executive Council or by the Central Committee and shall be signed by the President or Vice-President and be attested by the Executive Secretary. It shall set forth the specific

facts constituting the alleged misconduct. It shall be filed with the Executive Sescretary of this Association.

7. REFERENCE: In the order directing filing of the formal complaint, the Executive Council shall state whether it will try the matter in the exercise of original jurisdiction or will refer it for trial to a Grievance Committee or to an Examiner and if referred shall specify to whom it is referred.

8. SERVICE: Forthwith upon the filing of the formal complaint, the Executive Secretary shall serve upon each respondent therein named a copy of the formal complaint and a notice stating before whom the matter shall be heard. The trial authority shall control the setting of the case for trial. The date of hearing shall be not less than thirty days from the date of personal service or of mailing the notice. The service may be made upon a respondent in person or by certified mail or registered mail directed to him at his last address shown on the Executive Secretary's official roster of the members of the Association. Proof of mailing shall be sufficient to prove service.

9. ANSWER: The respondent may file a written answer, in which he shall specifically admit or deny the allegations of the charges. He may not challenge the formal complaint by demurrer or motion, but he may incorporate in his answer the objection that the Executive Council does not have jurisdiction or the objection that the acts or commissions alleged in the charges do not constitute misconduct which would warrant the imposition of discipline.

10. TRIAL ATTORNEYS: The Executive Council shall direct a local Grievance Committee to serve, or shall appoint one or more other members of the Association who shall serve as Trial Attorneys. Their duty shall be to serve as prosecutor in the proceeding.

11. TRIAL: Whether or not the respondent filed an answer or appears, the matter shall proceed to trial at such time as may be directed by the trial authority. Upon appearance and consent of the respondent, the matter, in the discretion of the trial authority, may be heard prior to the answer day. When called upon to answer or give testimony, the respondent shall make specific and complete disclosure as to all material matters, unless the respondent shall personally state that he declines to answer any particular question on the grounds that his answer might disclose matters that would tend to incriminate him or show him guilty of an act or defense that would be grounds for disbarment. When any respondent claims his right to decline to answer on either of these grounds, the trial authority may, within ts discretion, authorize the trial attorney, or attorneys, to present to the Chief Justice of the Supreme Court a petition setting forth the charges pending against respondent, the nature and purpose of the questions propounded, praying the Supreme Court to issue its writ against the respondent to show cause why he should not be suspended pending the further order of the court.

12. FILES AND PROCEEDINGS PRIVATE: The files of the Association in any disciplinary proceedings shall be private, except as herein otherwise provided. On request, the respondent or his attorney shall be given the names and addresses of witnesses to be used by the prosecution. The orders and minutes of the Executive Council, except with regard to charges or disciplinary proceedings against other persons, shall be open to any member of the Association. The proceedings under these rules before the Executive Council or a trial authority shall not be made public and the record shall be private and confidential, unless the resopndent shall request otherwise, or unless the Executive Council or the trial authority shall otherwise order. Upon it being shown that the matter has been so publicized or that the respondent has so conducted him-

self that the ends of justice or the public relations of the Bar require it, the proceeding shall be public. Reasonable notice of a proposal to make the hearing public shall be given the respondent, with opportunity to him to be heard in opposition. An order of publicity may be reviewed by the Executive Council on the request of the respondent, filed with the Executive Secretary within ten days from entry of the order, such review to be on a summary of the evidence or showing made at the hearing on the order, certified by the trial authority. Upon the filing in the Supreme Court of a recommendation of the Executive Council for discipline, the proceeding shall become public.

13. COSTS—ADDRESS FOR NOTICE:

(a) Except as hereinafter provided, the cost of all proceedings, including the cost of the record, shall be paid by the Association. The fees of an attorney for a private person filing and prosecuting charges or for the defendant shall not be part of such costs.

(b) The Executive Council in all cases, in making their report to this Court, shall recommend for or against the assessment of all or a part of the costs against a member recommended for disbarment, suspension or other disciplinary action.

(c) The person bringing the charges or the accused may request that a transcript of the record accompany the report of the trial authority. The person making the request shall pay the cost of such transcript.

(d) The respondent must, and the person bringing the charges may, file with the trial authority an address to which all notices thereafter may be mailed.

14. POWERS OF COMMITTEES AND PROCEDURE:

(a) The various Grievance Committees, the Executive Council and the members thereof, and the Examiners in any disciplinary proceeding may:

(1) Administer oaths and affirmations and hear evidence.

(2) Compel, by subpoena, the attendance of witnesses and the production of pertinent books, papers, and documents, either for deposition or for trial.

(b) The subpoena may be issued and the oath or affirmation be administered by any of the authorities enumerated, or by any officer authorized by law to issue subpoenas or administer oaths.

(c) A witness shall be paid on demand mileage and witness fees as provided by the law of this State in civil cases. On approval by the Executive Council, a witness may be reimbursed for his loss of time and expense in attending.

(d) Depositions may be taken before any of those referred to in paragraph (a) of this Section (14) or before any officer authorized by law to take depositions and may be used in the same manner as in civil cases.

15. NON-COMPLIANCE: Whenever any person, including the accused, subpoenaed or ordered to appear by the trial examiner or grievance committee and give testimony or to produce books, papers or documents, fails to comply, such failure shall be reported to the Supreme Court for appropriate action. Whenever such person having appeared refuses to testify or answer any proper question, his refusal shall also be certified to the Supreme Court for appropriate action.

16. BURDEN OF PROOF AND PROCEDURE:

(a) To warrant a finding of misconduct in contested cases, the charges must be established by a preponderance of the evidence, and, in cases where respondent defaults, by prima facie evidence.

(b) On a charge of solicitation of professional employment through a lay person or agency, it shall not be necessary to prove that such lay persons or agency received compensation.

(c) The practice in disciplinary proceedings shall be governed generally by the rules in civil proceedings, except as otherwise herein provided.

17. REPORTS OF HEARING: If a matter is heard before an authority other than the Executive Council, the trial authority, at the conclusion of the hearing, shall make written report thereon to the Executive Council. The report shall consist of findings of fact on all pertinent issues, conclusions of law, and a recommended disposition of the case, including disciplinary action, if any, and shall be accompanied by the original or a copy of the pleadings. A copy of the report shall be furnished to the trial attorneys, to the person bringing the charges and to the attorneys for the respondent, if he be so represented, if not then to the respondent, by mailing to such address as he filed with the hearing authority, or, if none has been filed, to his last known address. If the matter is heard by the Executive Council, the Council shall prepare a proposed report to the Supreme Court, containing the same matter as the report of a hearing authority, and in like manner copies thereof shall be furnished the person bringing the charges, the respondent or his attorney, and the trial attorneys.

18. PROCEEDINGS ON REPORT BY EXECUTIVE COUNCIL: The Executive Council may adopt, modify or set aside the proposed findings of fact, conclusions of law, and recommended disposition, including disciplinary action. If disciplinary action is recommended by the Executive Council, it shall file its final report with the Supreme Court. It shall mail a copy of its report to the respondent, by registered or certified mail, to the address given by him

as provided in Section 13, or, if no such address has been given, to his last known Post Office address. Proof of such service shall be filed with the Clerk of this Court. Action recommended may be (a) Private reprimand; (b) public censure; (c) suspension from practice; or (d) disbarment.

19. PRIVATE REPRIMAND: If the Executive Council recommends a private reprimand, the respondent may appeal to the Supreme Court by filing notice of such appeal with the Clerk of the Court, and with the Executive Secretary. Thereafter, the proceedings shall be governed by the rules relating to appeals from other disciplinary recommendations of the Executive Council. If no appeal is filed, the private reprimand shall be administered by the Executive Council or a member thereof, and the file, including all the pleadings and the record, shall be kept confidential but shall be preserved, and may be considered in any subsequent proceeding involving alleged professional misconduct by the respondent.

20. OTHER DISCIPLINARY ACTION:

(a) If the Executive Council recommends disciplinary action other than private reprimand, the matter shall be docketed in the name of the respondent. The same Grievance Committee or Trial Attorneys who presented the case before the trial authority, unless replaced by other appointees, shall appear in support of the recommendation to this Court. The respondent may appeal from the report by filing notice thereof, accompanied by a statement of the grounds of his exceptions thereto, with the Clerk of this Court within twenty days from the date of mailing the copy of the report to him, or within an additional period, if granted by the Court for good cause shown. He shall file, at the same time, a copy of his notice and statement of exceptions with the Executive Secretary. Unless his exceptions are predicated solely upon the report, the re-

spondent, within ten days after the filing of the appeal, shall file with the Executive Secretary a designation of such parts of the record as he deems necessary to present his contentions, and, within ten days thereafter, the Trial Attorneys may designate additional parts of the record deemed necessary to proper disposition of the matter. The Executive Secretary shall notify the respondent of the estimated cost of an original and two copies of the parts of the record so designated. Within ten days after mailing or direct communication of such estimate, the respondent shall deposit the estimated sum with the Executive Secretary. Thereupon, the Executive Council, as promptly as is reasonably possible, shall certify to the Court the parts of the record so designated, and furnish a copy to the respondent. When the actual cost has been determined, the balance shall be paid or the overage refunded.

(b) Upon the filing of the certified record, briefs shall be filed within the times fixed by the rules governing civil appeals and the matter shall be disposed of expeditiously.

(c) Where a respondent fails to file exceptions to the Court, upon motion made by the trial attorneys, the Court may enter an order giving effect to the recommendations contained in the report.

(d) The Court will adopt a finding of fact made by the Executive Council unless, upon a consideration of all of the record certified up, as above provided, it is of the opinion that such finding is not supported by a preponderance of the evidence.

(e) Upon submission of the matter to this Court, it shall either impose discipline or dismiss the proceedings.

21. DISPOSITION OTHER THAN DISCIPLINARY: If discipline is not recommended or private censure imposed by the Executive Council, the Executive Council may

dismiss the proceedings or order the charges and the record to be held in a confidential file. Such file may be used on a reopening of the proceeding if additional evidence is produced. No complaint or charge shall be dismissed except by express direction of the Executive Council or by the Court.

22. REINSTATEMENT: A member of this Association who resigns while disciplinary charges are pending against him, or who has been suspended or disbarred upon disciplinary charges, may be reinstated only on the following procedure:

(a) He shall file with the Executive Secretary an affidavit showing all his activities since the termination of his membership, and his places of residence since that date.

(b) He shall file affidavits of the Court Clerks in the several Counties in which he has resided, establishing that he has not practiced law in their respective courts, since the termination of his membership.

(c) He shall, if required by the Executive Council, procure at his own expense and cause to be filed with the Executive Council a report from the National Conference of Bar Examiners covering his activities during any time after such termination that he has resided outside the State.

(d) He shall establish affirmatively that he has undergone rehabilitation and that, if readmitted, there is reason to believe that his conduct will conform to the high standards required of a member of the Bar.

(e) He shall pay a fee of $100.00 which shall be retained, regardless of the decision on his application.

Each such application for reinstatement shall be referred by the Executive Council to a local Grievance Committee or to an Examiner for complete investigation and such hearing authority shall have the same power as in a

disciplinary proceeding under these rules, and shall make its findings of fact and recommendations to the Executive Council as provided for therein. Before any hearing may be had upon an application for reinstatement, public notice shall be given by the Executive Secretary in a newspaper of general circulation in the County of the residence of the applicant, and, if it be different, in the County of his *residence at the time of disbarment*. Notice shall also be given in the Oklahoma Bar Journal. The notice shall be published in one issue of each periodical and shall advise interested persons where and when they may be heard in opposition or support of the application. The cost of the publication shall be paid by the applicant. The Executive Council after consideration of the report of the hearing authority and all other relevant factors shall report its recommendation to the Supreme Court, together with the file in the proceedings, for action. In its recommendation the Executive Council shall make specific findings as to whether the applicant has engaged in any unauthorized practice law in the State of Oklahoma and that his re-ment and shall specifically state its findings as to whether the applicant possesses the moral qualifications, competency and learning in the law required for admission to practice law in the State of Oklahoma and that his resumption of the practice of law within this State will not be detrimental to the integrity and standing of the bar, or the administration of justice or to the public interest. The burden of proof in all reinstatement proceedings shall be on the applicant.

23. PRIOR RULES REVOKED: All rules and regulations heretofore promulgated by the Supreme Court pertaining to disciplinary matters in conflict herewith are hereby revoked.

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MAR 2 1964
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

On Appeal From the Supreme Court of the State of Oklahoma

MOTION TO DISMISS

CLAUDE H. ROSENSTEIN,
413 Midstates Building,
Tulsa, Oklahoma,
Attorney and Counsel for Appellee.

February, 1964.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY. PH. CE 8-8750

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In the
Supreme Court of the United States

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

On Appeal From the Supreme Court of the State of Oklahoma

MOTION TO DISMISS

Appellee, State of Oklahoma, *ex rel.* Oklahoma Bar Association, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss on the grounds (a) that the appeal does not present a substantial federal question and (b) that the judgment appealed from rests on an adequate non-federal basis.

STATEMENT

This is an appeal from a judgment and order of disbarment entered by the Supreme Court of Oklahoma on

June 18, 1963, in *State* v. *O'Bryan*, 385 P.2d 876 (Appendix A to Jurisdictional Statement). Petition for rehearing was denied on September 10, 1963.

Appellant was disbarred as a result of his unprofessional conduct in certain bankruptcy proceedings in the United States District Court for the Western District of Oklahoma involving a business trust known as Selected Investments. On March 24, 1958, Appellant filed a "proof of debt" in the bankruptcy claiming substantial fees for legal services rendered the bankrupt. On May 21, 1958, Appellant filed an amended proof of debt to which he attached a purported letter employment contract between himself and the bankrupt, bearing date of October 29, 1954. The trustee in bankruptcy objected to the allowance of Appellant's claim. Upon the hearing of the trustee's objections, at which Appellant appeared and testified concerning his claim, the Judge of the Federal Court, Honorable Stephen S. Chandler, found that the letter employment contract of October 29, 1954, was fraudulent, denied Appellant's claim and disbarred Appellant from practice in the Federal Court (Appendix to Jurisdictional Statement, pp. iii, v-viii).

Subsequently, Judge Chandler brought Appellant's conduct in his Court to the attention of the Executive Council of the Oklahoma Bar Association. The Executive Council, in accordance with authority vested in it by the rules of the Supreme Court of Oklahoma, assumed original jurisdiction of the matter, authorized the filing of a formal complaint against Appellant, and designated one of its members as Trial Examiner. The complaint against Appellant, signed by the then President of the Oklahoma Bar Associa-

tion, charged Appellant with filing false and fraudulent instruments in support of his proof of debt in the bankruptcy proceedings for the purpose of misleading the Court; and that such acts constituted professional misconduct in violation of Canons 22 and 29 of the Canons of Professional Ethics of the American Bar Association as adopted by the Supreme Court of Oklahoma (Appendix to Jurisdictional Statement, p. viii).

Appellant denied the charges of the complaint and requested a public hearing—which request was granted. Appellant was present in person and by his counsel at the hearing. The Trial Examiner found the Appellant guilty of the charges and recommended disbarment. The findings and recommendations of the Trial Examiner were reviewed and approved the Central Committee and Executive Council of the Oklahoma Bar Association and were then submitted to the Supreme Court of Oklahoma (Appendix to Jurisdictional Statement, p. ix).

The Supreme Court of Oklahoma found that the letterhead of the purported October 29, 1954, employment contract "was not in existence at least until 1955, probably in September" (Appendix to Jurisdictional Statement, p. xxvii), and concluded that the evidence established "to a reasonable certainty that the charge against him (Appellant) is true" (Appendix to Jurisdictional Statement, p. xxix). The recommendation of disbarment was approved.

THE FEDERAL QUESTIONS PRESENTED BY APPELLANT ARE NOT SUBSTANTIAL.

Appellant's contentions, briefly stated, are that:

1. The disciplinary procedure established under the Revised Rules of the Supreme Court of Oklahoma Creating, Controlling and Regulating the Oklahoma Bar Association (Appendix to Jurisdictional Statement, pp. liii, *et seq.*) is lacking in due process of law.

2. The manner and conduct of the disciplinary proceedings in this case as to Appellant denied him due process of law.

The Bar of Oklahoma is an integrated bar. *In re Integration of the State Bar of Oklahoma*, 185 Okla. 505, 95 P.2d 113. The Oklahoma Supreme Court has exclusive power to prescribe rules for the conduct of attorneys, their discipline, and to revoke permits to practice law. 5 Okla. Stat. 1961, Sec. 13; *State ex rel.* v. *Ferguson*, 356 P.2d 734 (Okla. 1960). The Oklahoma Supreme Court by rule has adopted the Canons of Ethics of the American Bar Association as the standard of professional conduct for members of its Bar, Article 10 of The Revised Rules Creating, Controlling and Regulating the Oklahoma Bar Association, 60 Okla. Stat. 1961, Chap. 1, App. 1. The authority of the Supreme Court of a State to integrate its Bar was affirmed by this Court in *Lathrop* v. *Donahue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L.Ed.2d 1191 (1961).

Due process in disciplinary proceedings requires that an attorney be given notice of the proceedings, an opportunity to defend at the hearing, and that the proceedings

be essentially fair. *Bradley* v. *Fisher*, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646 (1872); and see, cases cited in the annotation at 98 L.Ed. 856. Under the rules governing procedure in disciplinary matters of the Oklahoma Supreme Court, a copy of a complaint is served upon the attorney involved (Appendix to Jurisdictional Statement, p. ix), a trial is conducted, which may be public if the attorney requests (Appendix to Jurisdictional Statement, p. ix), and the findings of the Trial Examiner are reported to the Executive Council of the Bar.

The Executive Council may adopt, modify or set aside the findings of the Trial Examiner. In the event the Executive Council recommends disciplinary action, its report is filed with the Supreme Court and the respondent receives a copy. The recommendation of the Executive Council is reviewed by the Supreme Court in an adversary proceeding which affords the respondent ample opportunity to be heard (Appendix to Jurisdictional Statement, p. lxv).

Obviously, the rules of the Supreme Court provide for notice, a hearing, and the right to be represented by counsel. The right of fair trial is protected by the review of the recommendations of the Executive Council in the Supreme Court: as the Oklahoma Supreme Court stated in the decision which Appellant seeks to have reviewed, "The ultimate responsibility rests with the Court * * * This Court itself has the final say in matters of the present sort."

It is not the function of this Court to enact procedural rules for the discipline of members of State Bar Associations. In states having integrated bars, the State Supreme Courts may adopt the procedure deemed best suited for the local bar organization. Whatever the mechanics of the pro-

cedure, there is no matter for federal concern as long as minimal standards of due process are satisfied. Appellant fails to demonstrate in what particular the disciplinary procedure in his State is lacking in due process when measured against the applicable standard in such cases.

Appellant argues that the disciplinary procedure, *as applied in his case*, violated the required due process of law. He contends that alternative methods of procedure are available under the Rules, and that the Bar Association selected the procedure which was least advantageous and most unfavorable to him. Specifically, Appellant complains that the Executive Council conducted no preliminary investigation; that he was not given a copy of the report of the Trial Examiner before the review of this report by the Executive Council and Central Committee; and that he was denied oral argument before the Executive Council. These matters do not condemn the proceedings in Appellant's case: due process of law was satisfied by the hearing before the Trial Examiner and the complete review in the Oklahoma Supreme Court.

Appellant contends that the proceedings in his case are repugnant to the due process clause because the Trial Examiner was a member of the Executive Council. It is not unique in disciplinary proceedings for the roles of complainant and judge to be combined. This does not result in a denial of due process. *Brinkley* v. *Hassig*, 83 F.2d 351 (10th Cir. 1936); *McVicar* v. *State Board of Law Examiners*, 6 F.2d 33 (D.C.W.D. Wash. 1925).

Appellant characterizes as "hearsay" the admission in evidence of the transcript of the hearing in connection with his claim in bankruptcy, and particularly charges that the

Trial Examiner was unduly influenced by the order of disbarment entered by Judge Chandler. Where an attorney is accused of professional misconduct and violation of his solemn oath by committing a fraud upon a court, the admission of evidence of the alleged fraud cannot be a denial of due process. Appellant ignores the fact that the order of disbarment did not stand alone—ample evidence was introduced to demonstrate that the purported letter employment contract of October 29, 1954, was a forgery and a fraud upon the court.

In Section 4 of his Jurisdictional Statement, Appellant claims due process is violated in his case because the record is "warped." He bases this statement on the refusal of the Supreme Court of Oklahoma to issue a Writ of Mandamus to compel the Bar Association to make the minutes of the Executive Council in connection with his disciplinary action available to the Clerk of the Supreme Court of Oklahoma for inclusion in the record to be certified to this Court. Appellant had designated these minutes in his Notice of Appeal. However, these minutes had not been introduced in evidence in the hearing before the Trial Examiner and they were not in the record presented to the Supreme Court of Oklahoma; consequently, they were never a part of the record. Had Appellant made a timely request for these minutes, they would have been furnished him—the Rules so require—and Appellant could have made them a part of the record. Appellant cannot now complain that his own failure in this respect amounts to a denial of due process.

Appellant contends that his disbarment violates due process because the charge upon which he was disbarred—

filing a false and fraudulent claim—was "abandoned." This simply is not so. Appellee never at any time dismissed the charge of misconduct in filing a false instrument to support Appellant's bankruptcy claim. This strange argument is apparently based on the undisputed fact that Appellant rendered valuable professional services to the bankrupt; Appellant's conclusion being that his claim was therefore valid. Appellant's misconduct did not consist of filing a claim for services which were not rendered. The misconduct of which Appellant was charged lay in committing a fraud on the Court by attempting to bolster his claim with a false employment contract.

THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS

Appellant attempts, under the guise of due process arguments, to secure a review by this Court of propositions which were considered and determined by the Supreme Court of Oklahoma, as though this Court were authorized to review generally the correctness of the judgment of the Supreme Court of Oklahoma. This position on the part of Appellant is clearly disclosed by his discussion of the Pennsylvania case of *In re Schlesinger's Appeal* (p. 25, Jurisdictional Statement). Appellant there says "the Pennsylvania Supreme Court in that case was reviewing the action of a Common Pleas Court which was the court of first instance just as this Court sits now in review of the action of the Oklahoma Supreme Court which was the court of first instance in the case at bar." Such is not the function of this Court. As was stated in *Re Anastaplo*, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961):

> "We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the state's action."

In the absence of a showing of arbitrary or discriminatory action in the State Court proceedings resulting in disbarment, there is no matter of federal concern. *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appeal should be dismissed.

Respectfully submitted,

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February, 1964.

Office-Supreme Court, U.S.
FILED
MAR 14 1964
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

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March, 1964.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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In the

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WILLIAM HOWARD (PAT) O'BRYAN,
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STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Appellant is advised that the function of a Brief in Opposition to a Motion to Dismiss is to explain to this Court his position on the arguments of Appellee. This brief is therefore so arranged.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

Contrary to the suggestion made by Appellee, Appellant has not argued that the Rules of the Oklahoma Supreme Court in relation to disciplinary matters are in and

of themselves repugnant to the due process clause. Appellant's position is rather that as applied to him they are repugnant to due process.

The Rules are very flexible and it is entirely possible to follow them and have a perfectly valid disciplinary proceeding. But, such was not the case in the case at bar. As applied to Appellant, he was denied proceedings that were essentially fair.

Appellee's Motion to Dismiss (p. 5) reviews the procedure. At this point Appellant will object only to Appellee's exaggeration of the role of the Supreme Court of Oklahoma in the process of review. The review of the Court is of the record on exceptions, briefs and argument, Oklahoma Supreme Court Rules Art. VII, pt. 1, § 20(b) and (c) (Jurisdictional Statement, Appendix, p. lxv). Because this is the extent of the review, it is of utmost importance that the making of the record which is to be reviewed be essentially fair.

Appellee then turns to the examination of Appellant's contentions in his Jurisdictional Statement.

1.

The Bar Association's action in the selection among alternative procedures was arbitrary and capricious.

Appellant had contended that among the alternatives available to Appellee in the preliminaries, that Appellee had consistently chosen that alternative which gave Appellant the least opportunity to defend himself—even though the charge was one of utmost gravity. In answering Appellant's argument, Appellee tacitly admits the truth of this assertion (Motion to Dismiss, p. 6, first paragraph), and

says "due process was satisfied by the hearing before the Trial Examiner and the complete review [of the record] in the Oklahoma Supreme Court.

The matter of the fairness of the hearing before the Trial Examiner, becomes then the very keystone to due process.

2.

The combining in one body or members thereof of the role of accuser, prosecutor and judge was repugnant to the due process clause.

Appellant had argued in his Jurisdictional Statement, pages 24-29, that this hearing was fatally short of being a fair hearing because it was before a member of the Executive Council or Central Committee which body had preferred the charges and appointed the Trial Examiner from their own numbers. These same officials through Appellee's counsel at the hearing recommended disbarment to the Trial Examiner (Jurisdictional Statement, p. 25, referring to Tr. Vol. 2, p. 191).

Here on the record is a showing of actual bias of the group *from* which and *by* which the Trial Examiner was selected.

> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623, 625.

Appellee implies that *Brinkley* v. *Hassig*, 10 Cir., 1936, 83 F.2d 351 and *McVicar* v. *State Board of Law Examiners*, D.C. W.D. Wash., 1925, 6 F.2d 33, are persuasive of the

proposition that the combination of the roles of prosecutor and judge is not repugnant to due process (Motion to Dismiss, p. 6).

In re Murchinson, 349 U.S. 133, 136, 75 S.Ct. 623 (Jurisdictional Statement, p. 27), was decided in 1955 and *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S.Ct. 455, in 1950 (Jurisdictional Statement, p. 28).

Brinkley and *McVicar* were both decided many years before these two United States Supreme Court cases and hence the impact of the Supreme Court cases was not felt therein.

Of still further significance is this statement in the *Brinkley* case:

> "The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years." 83 F.2d at 356.

The Tenth Circuit decided the *Brinkley* case on the basis of necessity. It pointed out that the board in question was the only board empowered to hear the matter and pointed to the rule that disqualification would not be permitted to destroy the only tribunal with power in the premises.

This is obviously not like the case at bar. Herein as it was previously asserted there was no limit, other than the implied limit of membership in the Bar, as to whom the Central Committee or Executive Council might have appointed to act as Trial Examiner. And indeed, as pointed out, the selection of one of their own number was a departure from a past practice of considerable standing (Jurisdictional Statement, pp. 24-25).

In *McVicar*, the Court pointed out that the role of the Bar examiners, was that of "masters of the court to take proof and submit findings thereon," 6 F.2d at 35, and that "the board has no power to pass upon the merits of the charges made." *Id* at 36.

Under these circumstances, it would surely seem that the recent Pennsylvania case of *In re Schlesinger's Appeal*, 404 Pa. 584, 172 A.2d 835 (Jurisdictional Statement, pp. 26-27) whose facts are like those in the case at bar and which relies squarely on *Murchinson* is far more persuasive than *Brinkley* and *McVicar*.

3.

The admission of hearsay evidence denying the right of confrontation especially under certain special circumstances herein present, was repugnant to the due process clause.

Appellee's argument here is that Judge Chandler's summary order of disbarment (issued in patent violation of the principles laid down in *Theard* v. *U. S.*, 354 U.S. 278, 77 S.Ct. 1274) was evidence of Appellant's fraud and hence its introduction was not a denial of due process.

As Appellant has previously suggested (Jurisdictional Statement, p. 32), there is a split of authority as to whether the transcript of testimony taken in another suit can be admitted in a disbarment proceeding without denying due process. And even in these cases there is the requirement of the laying of the proper predicate. Here, no predicate was laid and the hearsay involved not only included testimony of witnesses, but a "void" order of disbarment by the Federal Judge.

In the *Theard* case, *supra*, this Court sought to prevent what it considered undesirable state disbarment proceedings from infecting disbarment proceedings in the Federal Courts. This Court ought to be just as concerned about the infection spreading in the opposite direction.

In order that the Court may not be misled, Appellant would call to its attention that there was no evidence that the purported letter employment contract was a forgery in the popularly accepted sense of the word. The authenticity of the signatures of the parties to the contract were never questioned.

4.

The danger inherent in the possible production of a warped record by a predisposed trial examiner is repugnant to the due process clause of the Constitution.

Appellee in its answer to this proposition of Appellant simply ignores the main thrust of Appellant's argument. Appellee considers only the question of the refusal of the State Supreme Court to have the minutes of the Bas Association certified as part of the record. Appellant wanted these minutes certified only to show further the predisposition of the Executive Council and of its member and appointee, the Trial Examiner in particular.

The warping of the record to which Appellant had reference in particular is itemized throughout the Jurisdictional Statement: *e.g.*, the Trial Examiner's erroneous refusal to consider certain testimony, to the effect that the letter contract was in existence well in advance of any dispute about the claim; and even to accept a brief on its

admissibility (Jurisdictional Statement, pp. 14 and 37); his admission of hearsay over Appellant's objection (*id.* p. 37); the Trial Examiner's refusal to admit evidence as to the Appellant's intent (*id.* p. 37); and the Trial Examiner's basing of his recommendation of disbarment, at least in part, upon Judge Chandler's ruling in the bankruptcy matter and his summary disbarment of Appellant (*id.* p. 31).

These are concrete examples of the way in which the record was warped.

Appellant's argument is simply this. The keystone of due process in a case of this nature is a fair hearing in the primary sense of the word, as here applied, the hearing before the Trial Examiner. This is so because it is the Trial Examiner who controls the making of the record. This record, where all further review is going to be based upon it, must be true and fair in any case. But more particularly this is true where the Trial Examiner is authorized not only to take evidence but to make findings, conclusions and recommendations.

It is contemplated that the findings and recommendations are to be given some weight by those who review it—otherwise, the Trial Examiner would not be authorized to make findings and recommendations. Regardless of the exact weight and the scope of review, a warped record and recommendations based thereon would put the momentum of the case running well against the accused. It is therefore of utmost necessity that the Trial Examiner be free of all predisposition.

5, 6, 7

Disbarment based on an abandoned charge of "having filed a false and fraudulent claim" violated the due process clause.

The fast and fancy foot-work of Appellee in this regard has kept Appellant off balance from the initiation of this matter.

And this footwork continues to this time. Appellee in its Motion to Dismiss admits, though not as expressly as did Appellee's counsel and Appellee's Trial Examiner (Jurisdictional Statement, pp. 15-16) that aside from the use of the allegedly ante-dated letter contract, Appellant's claim was not false and fraudulent and was in fact a valid claim in all respects.

Yet the charge, of which Appellant stands "convicted" in the eyes of the public, is that of having filed, without any foundation, a claim for a million dollar fee.

Appellee, except when pinned down, asserts not that Appellant filed a false instrument in support of an otherwise valid claim, but insists on charging him with filing a false and fraudulent claim. The Report of the Trial Examiner concludes:

> "From the foregoing facts the Trial Examiner concludes that the Respondent William Howard (Pat) O'Bryan filed a false and fraudulent claim for attorney fees * * *" (Jurisdictional Statement, Appendix, p. liii).

This is again repeated in the Report of the Executive Council to the Supreme Court of Oklahoma (Jurisdictional Statement, Appendix, p. xlvii).

The ambivalence of Appellee, in regard to what the charge against Appellant is and was, is significant in two respects. First, Appellee's insistance, on using the language "false and fraudulent claim," involves the use of the Big Lie technique, shows an utter disregard for basic decency and fair play, and is further evidence of the bias of the group which served as accuser, prosecutor, judge, and initial review board.

Second, the admission that Appellant's misconduct, if any there was, is solely that he bolstered his valid claim by the use of the disputed letter contract focuses attention on this matter. Evidence (and that completely discredited. Jurisdictional Statement, pp. 28-29) tending to prove that the stationery was not in existence until September 1955, is permitted to prove that a letter written thereon was not written until sometime in 1958.

THE ARGUMENT THAT THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS IS UNSOUND

Appellee suggests that Appellant, in relying on *In re Schlesinger's Appeal*, discloses that the judgment in the case at bar rests on an adequate non-federal basis (Motion to Dismiss, p. 8). Inasmuch as Appellant has asserted only that the Rules of the Supreme Court of Oklahoma, as applied to him, are repugnant to Federal due process, Appellant is confused by Appellee's argument.

The assertion that a judgment appealed from "rests on an adequate non-federal basis" is not responsive to the challenge that the judgment is repugnant to the due process clause of the Federal Constitution.

It is true that the judgment in the *Schlesinger* case was decided on a non-federal basis in part. The process so like the process herein involved was held to be offensive to the State Constitution of Pennsylvania as well as to the Federal Constitution in that the process combined in the members of one body the roles of accuser, prosecutor and judge. But that *Schlesinger* rested on an adequate non-federal basis does not destroy its persuasive value herein. There is certainly some relationship between the Pennsylvania and Federal due process concepts.

CONCLUSION

There is in the folklore of the law schools an apocryphal statement of Mr. Justice Holmes to this effect:

"If it makes you want to puke it lacks due process."

(From the salt content of the statement, Judge Learned Hand would be a more likely suspect.)

A nauseant will be found by many in the fact that all the behavior of Appellee would permit to be claimed for Appellee in the Motion to Dismiss was that it granted minimal due process.

To find such calloused indifference in the governing body of an association of lawyers (who are the proclaimed guardians and champions of the values of Magna Carta) is indeed disillusioning.

But that which is of significance to this Court is that Appellee, in its studied effort to deny Appellant all but the minimal due process, slipped in several important regards and denied him even that.

For that reason it is respectfully urged that this Court assume jurisdiction to hear this appeal on its merits.

Respectfully submitted,

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Of Counsel:

W. HOWARD O'BRYAN, JR.,

March, 1964.